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Supreme Court, U.S.
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In The

Supreme Court of the United States

DENALI, L.L.C. and AMERICAN BUSH, INC.,

Petitioners,

v.

UTAH STATE TAX COMMISSION, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Utah Supreme Court

PETITION FOR WRIT OF CERTIORARI

W. ANDREW MCCULLOUGH
Counsel of Record
6885 South State St.
Suite 200
Midvale, UT 84047
(801) 565-0894
wandrew48@qwestoffice.net

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Is Utah Code Ann. Title 59 Chapter 27 a content-based tax which violates the rights of Petitioners to free speech under the First Amendment to the U.S. Constitution?

2. Does the tax pass intermediate scrutiny under *United States v. O'Brien*, 391 U.S. 367 (1968)?

LIST OF ALL PARTIES

Current (Designated below as Plaintiffs and Appellants in Intervention):

Denali, L.L.C.
American Bush, Inc.

Former Plaintiffs, who have been dismissed from this action:

Bushco, Inc.
Companions Escorts, L.L.C.
TDM, Inc.
Valley Recreation, Inc.
D House, L.L.C.
RBD, Inc.
Wall St. Enterprises, Inc.

CORPORATE DISCLOSURE STATEMENT

Petitioner Denali, L.L.C. is a Utah Limited Liability Company, with no ties to any publicly held corporation. Petitioner American Bush, Inc., is a closely held Utah corporation with no ties to any publicly held corporation.

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OPINIONS AND ORDERS BELOW

There is no published opinion from the District Court in this matter. The Memorandum Decision of the District Court is included in the Appendix hereto. The decision of the Utah Supreme Court was entered on November 20, 2009, and is published as *Bushco v. Utah State Tax Commission,* 2009 UT 73, 225 P.3d 153 (Utah 2009). Rehearing was denied on February 2, 2010. A prior appeal was heard by the Utah Court of Appeals on the Tax Commission's contention that this case could not be brought directly to the District Court on a Declaratory Judgment action, and was published as *TDM v. Utah State Tax Commission,* 2004 UT App 433, 103 P.3d 190 (Utah App. 2004), *cert. denied*, 109 P.3d 804 (Utah 2005).

STATEMENT OF JURISDICTION

The decision of the Utah Supreme Court was entered on November 20, 2009, and is published. Rehearing was denied on February 2, 2010. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution

Amendment I

Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Utah Code Ann. §§ 59-27-101 to 108 (2008)

Sexually Explicit Business and Escort Service Tax

(See Appendix for text of Act)

STATEMENT OF THE CASE

Petitioners are two exotic dancing establishments in Utah which feature, or would like to feature, nudity as part of their performances. Pursuant to the "Sexually Explicit Business and Escort Service Tax", Utah Code Ann. Title 59 Chapter 27, such performances are subject to a special tax. (App. 65-72). Utah Code Ann. § 59-27-102 defines a "sexually explicit business" as "a business at which any nude or partially denuded individual, regardless of whether the nude or partially denuded individual is an employee of the sexually explicit business or an independent contractor, provides any service" for a fee, and for at least 30 days during a calendar year. (App. 66). Petitioners herein intervened in the original legal action seeking to invalidate the tax, which had been brought by several escort agencies, also the subject of the tax. The tax on escort agencies was invalidated as unconstitutionally vague by the Utah Supreme Court; and those former Plaintiffs do not participate in this Petition. Petitioners herein were designated as Plaintiffs in Intervention, and Appellants in Intervention, in the action below, and participated fully in all aspects of the legal process.

§ 59-27-103 enacts a tax "equal to 10% of amounts paid to, or charged by the sexually explicit business" as defined therein. Pursuant to § 59-27-105, certain portions of the money raised are earmarked for investigation or treatment of sex offenses or offenders. (App. 67, 69-70).

At a Utah House committee hearing, Kathy Okey, an employee of the Department of Corrections, testified regarding sex offenders. She was not introduced as an expert and presented no credentials for such expertise. Ms. Okey spoke of the number of offenders and the need in the correction system for more funding for therapy. Ms. Okey also said:

> I also think it important to point out that there is a cause and effect here. While most people who utilize sexually explicit businesses don't commit sex offenses, the vast majority of sex offenders utilize these kinds of services. So there is a cause and effect there that perhaps they should pay some of that burden. There was an analysis done by Hanson and Busia ["Hanson and Bussiere"] of sex offenders in the United States, Canada and Great Britain. The third top factor that indicates a sex offender's risk is paraphilias. Utilizing these types of services in one example of paraphilias. R.133-134.
>
> A paraphilia is an unusual sexual interest that you really have an obsession with. The ones that most people joke about is like women's shoes or feathers or those kinds of things would be examples. But it is an unusual interest in something. It's not necessarily illegal but generally people [who] have one type of that kind of interest also have others. With sex offenders, it's one of the things that it's a huge risk factor for them. R. 134.

> Accessing escort services or stripper bars is a type of paraphilia and they didn't divide at this percentage. It's just that paraphilia is one of the top contributors when you are looking if someone is going to re-offend. If they have paraphilia, this, it's one of the top things that you look at. R. 138.

The House added intent language to buttress that position after the bill had passed the Utah House of Representatives:

> For the legislature finds the Supreme Court of the United States has upheld the regulation of sexually oriented businesses *because of the deleterious effect they have on the community*. Sexually oriented business, [sic] it is in the best interest of the citizens of this state to provide counseling to individuals who have committed a sex offense. Most sex offenders continue to commit sex offenses if they do not receive treatment. Sex offender treatment is expensive. If an offender has to pay for treatment, restitution and normal living expenses, they generally cannot afford treatment. It is reasonable to tax sexually explicit businesses and escort services in order to provide counseling for individuals who have committed a sex offense. R. 126-127. (Emphasis added).

Petitioner Denali, L.L.C. presents a dance show in Salt Lake City featuring full nudity. As such, it is the only establishment of which Petitioners are aware in the State of Utah which is subject to the "sexually explicit business" tax, based solely on the lack of

adequate attire on its dancers. Petitioner American Bush, Inc. does not serve alcoholic beverages, and is subject to a City ordinance of the City of South Salt Lake. That ordinance is less restrictive than that required of establishments which serve alcohol. American Bush now complies with costume requirements which would be required of establishments which sell alcoholic beverages. A change in the attire would trigger the tax. American Bush, Inc. desires to include nudity in its performances, but fears the effects of the tax on its operations.

Plaintiffs filed an action seeking declaratory judgment, under the Utah Declaratory Judgment Act, Utah Code Ann. § 78-33-2, that the entire act was unconstitutional under the First Amendment to the U.S. Constitution. The district Court held that the tax was on nudity rather than expression and that it was valid under *United States v. O'Brien,* 391 U.S. 367 (1968).

The Utah Supreme Court upheld the law relating to nude dancing, against a First Amendment challenge. The Court ruled:

> ¶10 The similarities between this case and *Erie* are substantial and important. Like the Erie ordinance, the Tax is both generally applicable and neutral as to message. Also like the Erie ordinance, the Tax was enacted, according to the record before us, with the predominant purpose of serving an important state interest unrelated to the substantive content of protected expression. The

Tax is also similar to the ordinance in Erie in that it places only de minimis burdens on erotic nude dancing, a type of expression lying "only within the outer ambit of the First Amendment's protection" and "of a wholly different, and lesser, magnitude than the interest in untrammeled political debate." The Tax is distinguishable from the ordinance upheld in *Erie* only in its form and in the fact that the Tax is, in all respects, less broad and less burdensome than the Erie ordinance. (App. 7-8).

¶25 As a threshold matter, it is important to differentiate between the *O'Brien* test for a regulation of conduct that imposes incidental burdens on some protected expression and the test for a regulation of speech that targets secondary effects. Although both tests can be employed in situations that are factually similar, they are two distinct tests directed at two different inquiries. The *O'Brien* incidental burdens test applies to regulations of conduct that are content neutral both on their face and as to purpose. The *Renton* secondary effects analysis applies to regulations of speech that are content based on their face but are asserted to be content neutral as to purpose. And, in a case like this one, where the parties' arguments implicate both *O'Brien* and the secondary effects analyses, understanding the distinctions between the tests is key to reaching the correct result. (Internal citations omitted) (App. 19-20).

¶38 Finally, the Tax satisfies the fourth prong of the *O'Brien* test as well, in that the burdens that the Tax places on protected expression are no greater than necessary. Although the Supreme Court's use of the "no greater than necessary" language in *O'Brien* appears similar to the "least restrictive means" requirement for strict scrutiny, the Court has made clear that this prong does not require the state to show that its chosen means for advancing the substantial state interest is the least restrictive means available. Instead, the fourth prong of the *O'Brien* test *imposes only a requirement that the regulation be "narrowly tailored," in the sense that it "promote a substantial government interest that would be achieved less effectively absent the regulation."* De minimis impacts on protected speech are permissible. (Internal citations omitted) (Emphasis added) (App. 38).

REASONS FOR GRANTING THE WRIT

POINT I

UTAH CODE ANN. TITLE 59 CHAPTER 27 IS A CONTENT-BASED TAX WHICH VIOLATES THE RIGHTS OF PETITIONERS TO FREE SPEECH.

The disputed Tax is a content-based tax which violates the First and Fourteenth Amendments, contrary to the consistent decisions of this Court. This Court, back in 1819, stated: "That the power of

taxing it by the States may be exercised so as to destroy it, is too obvious to be denied." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 427 (1819). Since then, this Court has stricken several attempts to tax speech, as a violation of the First Amendment. In *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) this Court invalidated a license law which required members of the Jehovah's Witnesses to obtain a license before distribution of pamphlets from door to door: "It could hardly be denied that a tax laid specifically on the exercise of those freedoms would be unconstitutional." 319 U.S. at 108. In *Minneapolis Star v. Minnesota Comm'r of Rev.*, 460 U.S. 575, 586 (1983), this Court invalidated a "use tax" on paper and ink used by newspapers:

> Differential taxation of the press, then, places such a burden on the interests protected by the First Amendment that we cannot countenance such treatment unless the State asserts a counterbalancing interest of compelling importance that it cannot achieve without differential taxation.

This Court, in *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987), invalidated a discriminatory tax on certain magazines, in the State of Arkansas: "'[t]he First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic.'" 481 U.S. at 230. The Court reiterated that such a tax must pass strict scrutiny: "the State must show that its

regulation is necessary to serve a compelling State interest and is narrowly drawn to achieve that end." *Id.* at 231.

In *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 445 (2002) Justice Kennedy, concurring in the result and providing the fifth vote to support the plurality (see *Marks v. United States*, 430 U.S. 188 (1977)), specifically rejected a content-based tax to deal with secondary effects:

> On the other hand, a city may not regulate the secondary effects of speech by suppressing the speech itself. *A city may not, for example, impose a content based fee or tax.* This is true even if the government purports to justify the fee by reference to the secondary effects. Though the inference may be inexorable that a city could reduce secondary effects by reducing speech, this is not a permissible strategy. The purpose and effect of a zoning ordinance must be to reduce secondary effects and not to reduce speech. (Internal citations omitted) (Emphasis added).

The United States declared its Independence in part in rebellion over the hated "Stamp Act", which included a tax on newspapers, in a transparent attempt by the government to control the press.[1]

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[1] See Robert Hargreaves, *The First Freedom: A History of Free Speech*, Sutton Publishing (London 2002), pp. 114-115; 206-207.

Since that time, the Courts have consistently stricken taxes aimed at speech.

The Utah Court described the tax at issue as falling on nudity and not on expression. No business within the contemplation of the legislature, however, provided services merely by allowing nudity. Only expressive nudity was targeted. Expression is protected by the First Amendment against censorship, even when not verbal. See *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969) and *Texas v. Johnson*, 491 U.S. 367 (1989). In *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975), the Court recognized First Amendment protection for topless dancing in places not selling alcohol, on overbreadth grounds, as it would also apply to more "artistic" productions. This tax is censorship and is aimed at expressive conduct without regulating social ills which may accompany such conduct. Furthermore, it would apply to "mainstream" entertainment, should that entertainment be presented for at least 31 days during a calendar year. See also *Schad v. Mount Ephraim*, 452 U.S. 61 (1981). This Court has allowed regulation of nude dancing and other adult entertainment on the basis of "negative secondary effects" generated by establishments which feature such entertainment. See *Young v. American Mini Theatres*, 427 U.S. 50 (1976). *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), is the most frequently cited "secondary effects" case:

> The Ordinance by its terms is designed to prevent crime, protect the city's retail trade,

> maintain property values, and generally "protec[t] and preserv[e] the quality of [the city's] neighborhoods, commercial districts, and the quality of urban life," not to suppress the expression of unpopular views. 475 U.S. at 48.

This Court has allowed "reasonable time, place and manner restrictions" on businesses featuring nude dancing, See *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991) and *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000). Both the plurality and the dissent in *City of Erie* cited approvingly *Doran* and *Schad*.

The dissent in the Utah Supreme Court recognized what the legislature had done:

> ¶62 Despite the majority's efforts to demonstrate otherwise, this case is not the same as *Erie*. Rather, the Utah Legislature has enacted a statute that, by its own terms, makes it a content-based tax on First Amendment expressive speech; hence strict scrutiny should apply. Because the Utah State Tax Commission (the Commission) cannot show that the Tax is necessary to serve a compelling state interest and is narrowly tailored to that end, I would hold that the Tax violates the First Amendment to the United States Constitution. (App. 44).

This tax was promoted as a reaction to the "secondary effects" of adult businesses, including those which feature nude dancing. The law, however, is not a time, place or manner restriction. It is not

aimed at the local effects of a business at a particular time or place. The legislative history of the Act instead includes an attempt to build a connection between adult entertainment businesses and those who exhibit "paraphilias". However, the link is not that of cause and effect, but simple statistical and anecdotal information that such people may "access" such entertainment. The law is a content-based burden, subject to strict scrutiny. While the Utah Supreme Court rejected the State's arguments concerning "secondary effects", it also rejected strict scrutiny, and upheld the tax under its view of the "intermediate scrutiny" test promulgated in *United States v. O'Brien*, 391 U.S. 367 (1968):

> ¶ 33 A review of the relevant case law shows that the second prong of the *O'Brien* test does not require that the state provide evidentiary proof of a connection between the speech it regulates and secondary effects. Instead, all that is required is that the state show its regulation would advance a substantial state interest. (App. 25-26). See also Point II below.

This Court, in *Boos v. Barry*, 485 U.S. 312, 320 (1988) distinguished between laws aimed at "secondary effects" and those which are content based and require strict scrutiny:

> Regulations that focus on the direct impact of speech on its audience present a different situation. Listeners' reactions to speech are

not the type of "secondary effects" we referred to in *Renton*.

This question of constitutional law has become increasingly significant as states and local governments across the nation are considering, and some adopting, various content-based tax schemes. Whether motivated by the exigencies of the current financial crisis, hostility to erotic expression, or both, a growing number of legislatures are considering measures to impose special taxes on such speech.[2] Some state and local tax schemes have resulted in

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[2] See, e.g., S.B. 44, 95th Leg., Reg. Sess. (Mich. 2009) (proposed excise tax on adult entertainment facilities); S.B. 91 (09 LC37 0904S), 150th Gen. Assem., 1st Sess. (Ga. 2009) (proposed surcharge on sexually oriented businesses); A. 646, 2008-2009 Leg., 2009 Sess. (N.J. 2009) (proposed fee on sexually oriented businesses); A. 7126, 2009-2010 Leg., Reg. Sess. (N.Y. 2009) (proposed surcharge on sexually oriented businesses); A. 8158, 2009-2010 Leg., Reg. Sess. (N.Y. 2009) (proposed surcharge on sexually oriented media); H.B. 809, 106th Gen. Assem., 2009 Sess. (Tenn. 2009) (proposed annual tax of 25% on sales of sexually oriented material); H.B. 2070, 81st Leg., Reg. Sess. (Tex. 2009) (proposed admission fee for certain sexually oriented businesses); H.B. 2291, 79th Leg., 1st Sess. (W. Va. 2009) (proposed tax on sale or rental of obscene materials); H.B. 2242, 80th Gen. Assem., 2d Sess. (Iowa 2004) (proposed 25% tax on "adult enterprises"); S.B. 821, 92nd Gen. Assem., Reg. Sess. (Mo. 2004) (proposed 5% tax on adult entertainment and services); H.B. 1532, 2005 Leg., Reg. Sess. (Okla. 2005) (proposed 10% tax on sexually explicit businesses); H.B. 2466, 2007-2008 Leg., 2007 Sess. (Kan. 2007) (proposed 10% tax on sexually explicit businesses); A.B. 1551, 2007-2008 Leg., Reg. Sess. (Cal. 2007) (proposed 8% tax on adult entertainment enterprises); H.B. 304, Leg., Sess. 2009 (Pa. 2009) (proposed fee on sexually oriented businesses).

litigation in the lower courts, with mixed results. Without reaching constitutional issues, the New York Division of Tax Appeals reversed an initial finding of the Department of Taxation and held that an amusement sales tax exemption for "dramatic or musical arts performances" also applies to adult entertainment cabarets. *677 New Loudon Corp., d/b/a Nite Moves*, DTA No. 821458 (N.Y. Tax App., Mar. 12, 2009) ("that the dance routines are seductive in nature and titillation of a patron is the outcome, simply does not render such dance routines as something less than choreographed performances, or remove them from the exception to the general rule of [the] Tax Law"). That decision was recently reversed by the New York Tax Appeals Tribunal in *677 New Loudon Corp. d/b/a Nite Moves,* DTA No. 821458, reinstating the assessment on April 14, 2010. Constitutional issues were disposed of in one short paragraph at the end of the decision, without citation of authority. That case is now pending before the Appellate Division of the New York Supreme Court, Third Dept., as *677 New Loudon Corp. v. Tax Appeals Tribunal*, Docket No. 509646. The Texas Court of Appeals, in *Combs v. Texas Entertainment Ass'n, Inc.*, 287 S.W.3d 852, (Tex. Ct. App. 2009) invalidated a five dollar per customer charge on patrons of live nude entertainment. That case is now pending before the Supreme Court of Texas, as *Combs v. Texas Entertainment Ass'n, Inc.* Case No. 09-0481; and oral arguments were heard on March 25, 2010. The Illinois Supreme Court upheld city and county ordinances which allowed discriminatory tax

treatment, based on content, in *Pooh-Bah Enterprises v. County of Cook*, 232 Ill.2d 463, 905 N.E. 2d 781 (Ill. 2009), *cert. denied*, 130 S.Ct. 258 (2009), though the Court there distinguished the case as not involving a tax issue, but a subsidy of the arts. Pursuant to the Tax Injunction Act, 28 U.S.C. § 1341, essentially all challenges to taxes must be brought in State Courts; and this Court is the only Federal check on such taxing powers. These developments suggest a pressing need for this Court to clarify the law governing discriminatory taxation of free expression. Without guidance from this Court, lower courts will continue to reach disparate results on this important question of constitutional law.

Licensing fees for adult businesses, however, have been upheld by Federal courts only when those fees have some relationship to the cost of regulating the businesses. The concerns expressed by the legislature here certainly do not directly relate to the cost of such regulation. In *TK's Video, Inc. v. Denton County*, 24 F.3d 705, 710 (5th Cir. 1994) the Court upheld licensing fees for adult businesses and their employees but made it clear that it would not sustain a tax such as this one: "Government cannot tax First Amendment rights, but it can exact narrowly tailored fees to defray administrative costs of regulation. *Cox v. New Hampshire*, 312 U.S. 569, 576-77, 85 L.Ed. 1049, 61 S.Ct. 762 (1941)." In *Acorn Investments, Inc. v. City of Seattle*, 887 F.2d 219 (9th Cir. 1989), a discriminatory license tax involving adult businesses was invalidated where the tax was not related to the

costs of regulating those businesses. See also *729, Inc. v. Kenton County Fiscal Court*, 151 F.3d 485 (6th Cir. 2008); and *Big Hat Books v. Blackford County Prosecutor*, 565 F. Supp. 2d 981, 994-995 (S.D. Ind. 2008) (striking $250 assessment on sale of sexually explicit materials).

This Court, in *Simon & Schuster v. Crime Victims Bd.*, 502 U.S. 105 (1991), stated that: "Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment." 502 U.S. at 115-116. The expressive activity in this case is dance; and the discrimination is against the forum used, that of an establishment which features nudity for at least 30 days during a calendar year. The burden is not restricted to the nude dancing itself, as the tax continues even if the venue changes its fare after 30 days.

In *United States v. Playboy Entertainment Group*, 529 U.S. 803 (2000) this Court struck down a Federal statute requiring cable systems to fully scramble or block channels "primarily dedicated to sexually-oriented programming" for a substantial part of each day, to avoid it being seen by children: "It is of no moment that the statute does not impose a complete prohibition. The distinction between laws burdening and laws banning speech is but a matter of degree." See also *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989).

In *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 253-254 (2002), this Court invalidated a Federal statute aimed at preventing child pornography: "The mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it." The government may not prohibit speech because it increases the chances an unlawful act will be committed "at some indefinite future time." *Hess v. Indiana*, 414 U.S. 105 (1973) (*per curiam*).

This Court differentiated between secondary effects regulations, which require only "intermediate scrutiny", and "primary effects" regulations, which are subject to strict scrutiny, in *Reno v. American Civil Liberties Union*, 521 U.S. 844, 867-868 (1997):

> And the purpose of the CDA is to protect children from the primary effects of "indecent" and "patently offensive" speech, rather than any secondary effects of such speech. Thus the CDA is a content-based blanket restriction on speech and, as such, cannot be "properly analyzed as a form of time, place and manner regulation."

The tax at issue here singles out speech for burden because of the alleged possibility that lawful speech may tend to influence the listener towards inappropriate conduct. Surely the State cannot justify this tax on the basis of any compelling State interest. Nor can it show that the statute is narrowly drawn to achieve that end, and not to unnecessarily interfere with expression. Once again from the dissent in the Utah Supreme Court:

> ¶68 The Tax is a content-based regulation. It applies solely based on the narrow content of the business activity, namely, whether it involves nudity. While the Commission argues that the Tax could be applied conceptually to any type of business, this purported expansive reach does not make it content neutral. Just the opposite is true: it applies to exotic dancing but not to traditional ballet, an art exhibit, or a theatrical performance. In short, it is the content of expression that triggers the Tax. (App. 46-47).

The statute at issue here is directed at nudity that is "accompanied by expressive activity". It does *not* purport to affect public nudity; and there is no application of the tax except to businesses which feature nudity in an expressive setting.

POINT II

THE STATUTE IS UNCONSTITUTIONAL UNDER THE INTERMEDIATE SCRUTINY TEST OF *O'BRIEN*.

The standard for the application of intermediate scrutiny is *United States. v. O'Brien*, 391 U.S. 367 (1968). As the Utah Court correctly pointed out:

> ¶24 As a content-neutral regulation of conduct that imposes incidental burdens on some protected expression, the Tax is constitutional so long as it passes intermediate scrutiny under the *O'Brien* test. Under

> *O'Brien*, a regulation of conduct is constitutional and must be upheld so long as: (1) it is within the power of the legislature to enact; (2) it furthers a substantial government interest; (3) the government interest is unrelated to the suppression of protected expression; and (4) any incidental restrictions it imposes on protected expression are not greater than is essential to further the interest. (App. 19-20).

This Court there upheld a conviction of a man who burned his draft card in an act of civil disobedience. A general statute regulating behavior may *incidentally* burden expression. The Court found that the statute did not violate the First Amendment by restricting the destruction of a draft card in a symbolic act of resistance to the draft: "O'Brien first argues that the 1965 Amendment is unconstitutional as applied to him because his act of burning his registration certificate was protected 'symbolic speech' within the First Amendment." *Id.* at 376. This Court held that the statutory scheme which required persons of draft age to register for the draft and to carry their draft cards on their person was a valid exercise of Congressional power to raise an army and to maintain the security of the country:

> The many functions performed by Selective Service certificates establish beyond doubt that Congress has a legitimate and substantial interest in preventing their wanton and unrestrained destruction and assuring their continuing availability by punishing

> people who knowingly and wilfully destroy or mutilate them. *Id.* at 391-80. (Internal citations omitted).

In that case, however, there was a direct link between the regulation and the public purpose. That link is imperative for a law to pass intermediate scrutiny. In *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989) this Court held that the government "may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals."

The Utah Supreme Court dispensed with the need for such a link in its decision here; and in doing so, it failed to apply intermediate scrutiny. The State claims that money needs to be raised for sex offender therapy; but the targeted tax is unrelated to the need. The Utah Court erred in its application of *O'Brien*, because it neglected the heightened scrutiny which is required even when the effect on protected expression is "incidental". Because there is *absolutely no evidence of any connection* between the target of the tax and the evil sought to be addressed, the tax is *not* narrowly tailored as a matter of law. The challenged tax provisions fail to comport with the requirement that "any incidental restrictions it imposes on protected expression is not greater than is essential to further the interest" in several respects. Certainly the State has the power to tax and raise revenue. The need for therapy for those who have been convicted of sexual offenses is not in controversy. The statute, however, fails both the third and fourth parts of the

O'Brien test. It is not mainly a revenue raising measure. The Utah Court was simply wrong in stating: "The legislative record before us supports the conclusion that the predominant reason the Tax was enacted was to provide treatment for sex offenders, not to suppress protected expression." ¶ 19.

Under "intermediate scrutiny", the State must show some clear relationship between this tax and *proven harms*; and that the measure deals with such proven harms to a *material degree*. More direct means are easily available to deal with the need for sex therapy; and *O'Brien* scrutiny requires them to be used. This tax is punitive in its effect; and it is so without any reference to secondary effects *or any other reason* to justify its choice of targets. In fact, such a burden of a general tax on any one person, of class of persons, truly would be "de minimis", which this tax most certainly is not.

The Utah Court emphasized the difference between the *O'Brien* test and the *Renton* test used in secondary effects cases, which it stated "are two distinct tests directed at two different inquiries." (¶ 25) (App. 20). The Court said that "understanding the distinctions between the two tests is key to reaching the correct result." *Id.* The Utah Court rejected the "secondary effects" arguments relied upon by both the trial court and the State's attorneys; but did not properly differentiate between the two tests. The tests are more similar than the Court stated; and they are often intertwined. The essential difference is the nature of the problem addressed. In

the zoning cases, the constant problem is that of secondary effects. In *O'Brien* itself, the problem was avoiding disruption of the Selective Service Act and the constitutional power of Congress to wage war. Here, it is said that the problem is that of sex offenders who are not receiving therapy that is needed to avoid re-offending. The missing link is most obvious: The Court rejected the Attorney General's argument that the existence of adult entertainment businesses *causes or contributes to* that problem. (See ¶¶ 25-29) (App. 23-29). When the Court did so, it cut the tie to either the *O'Brien* test or the *Renton* "secondary effects" test. It is this link which is necessary for a statute to pass intermediate scrutiny.

In *City of Los Angeles v. Alameda Books*, 535 U.S. 425 (2002) this Court held that the City's claim of regulating secondary effects must have a valid basis: "the City certainly bears the burden of providing evidence that supports a link between concentrations of adult operations and asserted secondary effects". *Id.* at 437. And it allowed an affected business to show a lack of such a link:

> This is not to say that the municipality can get away with shoddy data or reasoning. The municipality's evidence must fairly support the municipality's rationale for its ordinance. *Id.* at 438.

The link between the regulation and "secondary effects" in the *Renton* line of cases is exactly the same as the link that is required under *O'Brien*. The regulation under *O'Brien* must be "narrowly tailored"

(*Bushco* ¶ 38; App. 31) to deal with a problem that is connected with the solution. The legislature took pains to add into the record concerns about "paraphilias" to provide some tenuous link between the target of the tax and the need for more money to deal with sex offender therapy. But the Court did not mention any such link. There is no authority whatsoever for taxing adult businesses because of the general need for sex therapy.

This Court, in *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000) again discussed "secondary effects" and the *O'Brien* test, making no differentiation in the targets of the two tests. Justice O'Connor, writing for the majority (on this point) referred to the ordinances as one designed to deal with such effects:

> In other words, the Government regulation prohibiting the destruction of draft cards was aimed at maintaining the integrity of the Selective Service System and not at suppressing the message of draft resistance that O'Brien sought to convey by burning his draft card. So too here, the ordinance prohibiting public nudity is aimed at combating crime and other negative secondary effects caused by the presence of adult entertainment establishments like Kandyland and not at suppressing the erotic message conveyed by this type of nude dancing. Put another way, *the ordinance does not attempt to regulate the primary effects of the expression, i.e., the effect on the audience of watching nude erotic dancing, but rather the*

> *secondary effects, such as the impacts on public health, safety, and welfare*, which we have previously recognized are "caused by the presence of even one such" establishment. *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-48, 50 (1986); see also *Boos v. Barry*, 485 U.S. 312, 321 (1988).

529 U.S. at 291. (Emphasis added).

It is well established that there must be a reasonable relation between perceived evils (whether they be secondary effects or disruption of the war effort) and the remedy applied by the government. See also *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 71 (n. 20). As observed by the Utah dissent:

> ¶75 Because the Tax regulates expression "based on its content, it must be narrowly tailored to promote a compelling Government interest." *United States v. Playboy Entm't Group*, 529 U.S. 803, 813 (2000). The Commission, however, argues that the Tax's constitutionality should be evaluated under intermediate scrutiny because it regulates based on negative secondary effects. However, the doctrine of secondary effects does not apply. The sole secondary effect the Commission identifies is sex offenses. This effect, however, lacks any empirical, reasonable connection to the viewing of nudity, which consequently makes the Tax a reaction to a primary effect. (App. 50).

The Utah Court seemed to say that choosing nudity in a commercial setting as the target of a

narrow-based tax, which almost certainly will raise very little money, required no justification. The requirement, however, of narrow tailoring, does indeed require a link between the regulation and the problem; and this link is not present.

CONCLUSION

This case contains important issues regarding taxation and the First Amendment. Moreover, the issues have recently been litigated in several forums; and there is a movement towards similar taxes in various States, which requires clear guidelines from this Court. This is a content-based tax which is not imposed as a consequence of "secondary effects". Instead, it is directed towards alleged "primary effects", including the effect it may have on those who might be, or might become, sex offenders. Such a tax should be subject to strict scrutiny. Because all challenges to such taxes must be brought in State courts; and because such scrutiny is less likely to be applied by State courts, litigation will certainly multiply without further guidance.

RESPECTFULLY SUBMITTED this 25th day of May, 2010.

W. ANDREW MCCULLOUGH, L.L.C.

W. ANDREW MCCULLOUGH
Attorney for Petitioners

2009 UT 73

This opinion is subject to revision before final publication in the Pacific Reporter.

IN THE SUPREME COURT
OF THE STATE OF UTAH

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Bushco, dba Babydolls Escorts; Valley Recreation, Inc. dba Kitty's Escorts and Angel's Escorts; The D. House, LLC dba The Doll House,

Plaintiffs and Appellants,

v.

Utah State Tax Commission; Pam Hendrickson, R. Bruce Johnson, D'Arcy Dixon Pignanelli, and Mark B. Johnson (in their official capacities as members of the Utah State Tax Commission),

Defendants and Appellees.

No. 20070559

FILED
November 20, 2009

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Third District, Salt Lake
The Honorable Tyrone E. Medley
No. 040911691

Attorneys: W. Andrew McCullough, Midvale, for plaintiffs
Susan L. Barnum, Nancy L. Kemp, Salt Lake City, for defendant Utah State Tax Commission
Nancy L. Kemp, Salt Lake City, for defendants Pam Hendrickson, R. Bruce Johnson, D'Arcy Dixon Pignanelli, and Mark B. Johnson
Marina Baginsky Lowe, Salt Lake City, for amicus curiae ACLU Foundation of Utah

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DURRANT, Associate Chief Justice:

INTRODUCTION

¶ 1 In 2004, the Utah legislature enacted the Sexually Explicit Business and Escort Service Tax[1] (the "Tax"), which imposes a 10 percent gross receipts tax on businesses whose employees or independent contractors (1) perform services while nude or partially nude for 30 days or more per year, or (2) provide companionship to another individual in exchange for compensation. The revenue generated by the Tax helps fund treatment programs for convicted sex offenders and investigations of internet crimes against children.

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[1] Utah Code Ann. §§ 59-27-101 to -108 (2008).

¶ 2 Plaintiffs, a group of escort service agencies and erotic dancing clubs, challenge the Tax as a violation of their First Amendment rights under the United States Constitution. We hold that the statutory provisions imposing the Tax on businesses whose employees provide services while nude are constitutional as a content-neutral regulation of conduct that imposes de minimis burdens on protected expression. However, we conclude that the provisions applying the Tax to escort services are unconstitutionally vague.

BACKGROUND

¶ 3 The Tax creates a mechanism for taxing businesses in which individuals perform services while nude or partially nude. Specifically, "[a] tax is imposed on a sexually explicit business equal to 10% of amounts paid to or charged by the sexually explicit business for . . . (a) an admission fee; (b) a user fee; (c) a retail sale of tangible personal property made within the state; (d) a sale of . . . food . . . ; (e) a sale of beverage; and (f) any service."[2] A sexually explicit business is defined as any business where a "nude or partially denuded" employee or contractor "performs any service: (a) personally on the premises of the sexually explicit business; (b) during at least 30 consecutive or nonconsecutive days within a calendar

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[2] *Id.* § 59-27-103.

year" and is paid or compensated for such service.[3] To be "nude or partially denuded" means that "any of the following [is] less than completely and opaquely covered: (a) genitals; (b) the pubic region; or (c) a female breast below a point immediately above the top of the areola."[4]

¶ 4 The statute also provides for a tax on escort services. An escort service is "any person who furnishes or arranges for an escort to accompany another individual for: (a) companionship; and [for:] (b)(i) a salary; (ii) a fee; (iii) a commission; (iv) hire; (v) profit; or (vi) any amount similar to an amount listed in this Subsection 2(b)."[5] An escort is "any individual who is available to the public for the purpose of accompanying another individual" for compensated companionship.[6] "[A] tax is imposed on an escort service equal to 10% of amounts paid or charged by the escort service for any transaction that involves providing an escort to another individual."[7]

¶ 5 The proceeds from the Tax are to be split between the Department of Corrections, Adult Probation and Parole Division, and the Attorney General's office.[8] Specifically, portions of the proceeds are

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[3] *Id.* § 59-27-102(4).

[4] *Id.* § 59-27-102(3).

[5] *Id.* § 59-27-102(2).

[6] *Id.* § 59-27-102(1).

[7] *Id.* § 59-27-103(2).

[8] *Id.* § 59-27-105(4).

dedicated to "provide treatment services" to individuals convicted of sex offenses, including indigent or nonworking adults, other individuals who are subject to Adult Probation and Parole jurisdiction, and juveniles.[9] A portion of the fund is also designated for a task force that "investigates and prosecutes individuals who use the Internet to commit crimes against children."[10]

¶ 6 Plaintiffs, a group of escort service agencies and erotic dancing clubs, initiated this action against the Utah State Tax Commission (the "Commission") in 2004 by filing a complaint seeking (1) a declaratory judgment that the Tax was an unconstitutional burden on both their right to freedom of speech guaranteed by the First Amendment and their right to equal protection guaranteed by the Fourteenth Amendment; and (2) a permanent injunction against enforcement and collection of the Tax. Both parties moved for summary judgment. The district court granted the Commission's motion for summary judgment while denying Plaintiffs' motion. Specifically, the district court held that the Tax did not violate Plaintiffs' First Amendment rights because it was constitutional under *United States v. O'Brien*.[11] The court also found that the Tax did not violate the Equal Protection Clause of the Fourteenth Amendment because the

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[9] *Id.*

[10] *Id.* § 59-27-105(4)(e).

[11] 391 U.S. 367 (1968).

Tax was rationally related to the legitimate government interest in providing treatment for sex offenders.[12]

¶ 7 Plaintiffs timely appealed the district court's grant of summary judgment to this court. We have jurisdiction pursuant to Utah Code section 78A-3-102(3)(j) (2008).

STANDARD OF REVIEW

We review a grant of summary judgment for correctness, according no deference to the district court's decision.[13] The district court's determination that the Tax is constitutional is also a legal conclusion that we review for correctness.[14]

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[12] Plaintiffs have not pursued their equal protection argument on appeal.

[13] *Schurtz v. BMW of N. Am., Inc.*, 814 P.2d 1108, 1111-12 (Utah 1991).

[14] *Snyder v. Murray City Corp.*, 2003 UT 13, ¶ 17, 73 P.3d 325 ("[B]ecause interpreting the . . . Constitution presents a question of law, we review the trial court's determination for correctness and give no deference to its legal conclusions."); *see also Wood v. Univ. of Utah Med. Ctr.*, 2002 UT 134, ¶ 7, 67 P.3d 436 ("The issue of whether a statute is constitutional is a question of law, which we review for correctness, giving no deference to the trial court." (citation and internal quotations marks omitted)).

ANALYSIS

¶ 8 In 1994, the city of Erie, Pennsylvania passed an ordinance making public nudity a criminal offense.[15] While the ordinance was a simple, generally applicable prohibition of public nudity on its face, it contained a preamble expressly acknowledging that the ordinance was adopted "for the purpose of limiting a recent increase in nude live entertainment within the City."[16] Additionally, Erie's city attorney stated that the ordinance "was not intended to apply to 'legitimate' theater productions."[17]

¶ 9 When the ordinance was challenged by nude dancing clubs as an unconstitutional burden on their First Amendment right to engage in erotic nude dancing, the United States Supreme Court upheld the ordinance, concluding that its predominant purpose was to advance the city's interest in limiting negative secondary effects – an interest unrelated to the substantive content of nude dancing expression.[18]

¶ 10 The similarities between this case and *Erie* are substantial and important. Like the *Erie* ordinance, the Tax is both generally applicable and neutral as to message. Also like the *Erie* ordinance,

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[15] *Pap's A.M. v. City of Erie*, 719 A.2d 273, 275 (Pa. 1998), *rev'd*, 529 U.S. 277 (2000).

[16] *City of Erie v. Pap's A.M.*, 529 U.S. 277, 290 (2000) (internal quotation marks omitted).

[17] *Id.* at 292.

[18] *Id.* at 296, 302.

the Tax was enacted, according to the record before us, with the predominant purpose of serving an important state interest unrelated to the substantive content of protected expression. The Tax is also similar to the ordinance in *Erie* in that it places only de minimis burdens on erotic nude dancing, a type of expression lying "only within the outer ambit of the First Amendment's protection"[19] and "of a wholly different, and lesser, magnitude than the interest in untrammeled political debate."[20] The Tax is distinguishable from the ordinance upheld in *Erie* only in its form and in the fact that the Tax is, in all respects, less broad and less burdensome than the *Erie* ordinance.

¶ 11 We begin our analysis by evaluating the Tax's content neutrality and then assess whether it passes constitutional muster under the appropriate level of scrutiny. We determine that it does. We next turn to the question of whether the Tax is unconstitutionally overbroad and determine that it is not. We finish by analyzing whether the statutory provisions applying the Tax to escort services are unconstitutionally vague and conclude that they are.

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[19] *Id.* at 289.

[20] *Id.* at 294.

I. THE TAX IS CONTENT NEUTRAL BECAUSE ITS APPLICATION IS TRIGGERED SOLELY BY CONDUCT, AND THE RECORD DOES NOT ESTABLISH THAT IT WAS ENACTED WITH THE PREDOMINANT PURPOSE OF SUPPRESSING PROTECTED EXPRESSION

¶ 12 A regulation of speech or expressive conduct is content neutral so long as the government interest underlying the regulation is not related to the suppression of protected expression.[21] A statute is "unrelated to the suppression of expression," and therefore content neutral, so long as it is both facially neutral[22] and does not have the "predominant" purpose of suppressing protected expression.[23]

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[21] *Ward v. Rock Against Racism,* 491 U.S. 781, 791 (1989) ("The principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." (internal citation omitted)).

[22] *City of Los Angeles v. Alameda Books, Inc.,* 535 U.S. 425, 448 (2002) (Kennedy, J., concurring) ("[W]hether a statute is content neutral or content based is something that can be determined on the face of it; if the statute describes speech by content then it is content based.").

[23] *See, e.g., City of Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 49 (1986) (noting that a finding that a statute's "predominant intent" was to limit negative secondary effects was "more than adequate to establish that the city's pursuit of its zoning interests here was unrelated to the suppression of free

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¶ 13 Plaintiffs' contention that the Tax is an unconstitutional burden on their First Amendment rights is based primarily upon their assertion that the Tax is content based. We disagree and conclude that the Tax is facially neutral because its application is triggered without reference to the content of any protected expression. Additionally, the record before us does not establish that the Tax was enacted with the predominant purpose of suppressing protected expression.

A. The Tax Regulates Nudity, Rather Than Nude Dancing, and Is Therefore Facially Content Neutral

¶ 14 The starting point for analysis of a regulation that impacts expressive conduct is the Supreme Court's decision in *United States v. O'Brien*, where the Court rejected the proposition that a "limitless variety of conduct" qualifies as speech simply because it is potentially expressive.[24] Because

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expression"); *see also Turner Broad. Sys. v. F.C.C.*, 512 U.S. 622, 646 (1994) ("[E]ven a regulation neutral on its face may be content-based if its manifest purpose is to regulate speech because of the message it conveys.").

[24] 391 U.S. 367, 376 (1968) ("We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."); *see also Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 570 (1991) ("It can be argued, of course, that almost limitless types of conduct – including appearing in the nude in public – are 'expressive,' and in one sense of the word this is true. People who go about in the nude in public may be expressing

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all conduct is potentially expressive, holding that each law regulating conduct implicates the First Amendment would largely eviscerate the distinction between conduct and speech.

¶ 15 Instead, the Court has recognized that regulations of conduct, so long as the conduct is not inherently expressive, should be treated as content neutral if the regulations are neutral as to message.[25] This is so because, in order to be content based, a regulation must classify based on the content of protected expression. A regulation that classifies based on unprotected conduct by definition does not classify based on protected expression and therefore is not content based. While regulations of unprotected conduct are still subject to First Amendment scrutiny when they burden protected expression,[26] they are scrutinized at a lower level since the concerns that prompt strict scrutiny are absent when conduct, rather than speech, is the triggering factor.[27]

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something about themselves by so doing. But the court rejected this expansive notion of 'expressive conduct' in *O'Brien*. . . .").

[25] *See Schultz v. City of Cumberland*, 228 F.3d 831, 840-41 (7th Cir. 2000); *see also City of Erie v. Pap's A.M.*, 529 U.S. 277, 289 (2000) (noting that nudity is not "an inherently expressive condition" and finding a public nudity ordinance content neutral).

[26] *See, e.g., O'Brien*, 391 U.S. at 376-77; *see also Erie*, 529 U.S. at 289.

[27] *Turner Broad. Sys.*, 512 U.S. at 641-42 ("[T]he First Amendment, subject only to narrow and well-understood exceptions, does not countenance governmental control over the

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¶ 16 In this case, application of the Tax is triggered by nudity, which the Supreme Court has specifically declared "is not an inherently expressive condition."[28] Because it is not inherently expressive, nudity is unprotected conduct rather than protected expression. Accordingly, in *Erie*, the Court "clarif[ied] that government restrictions on public nudity . . . should be evaluated under the framework set forth in *O'Brien* for content-neutral restrictions on symbolic speech."[29] The Court rejected the argument that a ban on nudity was necessarily a ban on the message conveyed, distinguishing nudity as a means of expression rather than protected expression itself.[30]

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content of messages expressed by private individuals. Our precedents thus apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content. Laws that compel speakers to utter or distribute speech bearing a particular message are subject to the same rigorous scrutiny. In contrast, regulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny, because in most cases they pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue." (internal citations omitted)).

[28] *Erie*, 529 U.S. at 289.

[29] *Id.*

[30] *Id.* at 292-93 ("The public nudity ban certainly has the effect of limiting one particular means of expressing the kind of erotic message being disseminated at Kandyland. But simply to define what is being banned as the 'message' is to assume the conclusion. . . . Although there may be cases in which banning the means of expression so interferes with the message that it essentially bans the message, that is not the case here."); *see also Barnes*, 501 U.S. at 571 ("[W]hile the dancing to which [the

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¶ 17 Facially, at least in terms of the content-neutrality analysis, the Tax is indistinguishable from the public nudity ordinance upheld in *Erie*. Like that ordinance, the Tax regulates the condition of nudity – not just specific instances of protected expression, like nude dancing.[31] Also like the *Erie* ordinance, the Tax applies or does not apply without reference to either protected expression or any particular message. The Tax simply cannot be facially content based because its trigger – nudity – is not "content" since it is not protected expression. On its face, therefore, the Tax is *conduct based,* rather than *content based,* and as such is facially content neutral.

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ordinance] was applied had a communicative element, it was not the dancing that was prohibited, but simply its being done in the nude.").

[31] The tax applies to all businesses "at which any nude or partially denuded individual . . . performs any service . . . personally on the premises . . . during at least 30 consecutive or nonconsecutive days within a calendar year. . . ." Utah Code Ann. § 59-27-102(4) (2008). It does not differentiate between strip clubs and theaters or between escort services and artistic modeling agencies. The tax applies equally to all businesses providing nude services for the requisite period of time.

B. The Tax Is Also Content Neutral Because the Record Does Not Support Plaintiffs' Allegations That the Legislature's Predominant Purpose in Enacting the Tax Was to Suppress Protected Expression

¶ 18 Because the Tax is facially neutral, we must conclude that it is content neutral unless there is other evidence in the record establishing that the Tax, although neutral on its face, is predominantly a covert attempt to suppress protected expression.[32] While facial neutrality will not save a statute enacted with the predominant purpose of suppressing the expression of particular viewpoints or the discussion of certain subjects, the Supreme Court has repeatedly declined to infer an intent to suppress protected expression on the "basis of an alleged illicit motive."[33] There must be actual evidence in the record establishing that suppression of protected expression was the statute's predominant purpose.[34]

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[32] *Turner Broad. Sys.*, 512 U.S. at 645 ("Our cases have recognized that even a regulation neutral on its face may be content-based if its manifest purpose is to regulate speech because of the message it conveys."); *see also Ward v. Rock Against Racism*, 491 U.S. 781, 781-91 (1989) ("The principal inquiry in determining content-neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys.").

[33] *See e.g., Erie*, 529 U.S. at 292.

[34] *See City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-48 (1986); *see also Erie*, 529 U.S. at 291-92.

¶ 19 We find nothing in the record before us – either the Tax's legislative history or in the text of the Tax itself – establishing that the Tax was enacted with the predominant purpose of suppressing protected expression. While some individual legislators did express concern regarding whether the Tax was intended to target nude dancing clubs,[35] the legislative history does not establish that this was the Tax's predominant purpose. In fact, the Tax's sponsors consistently emphasized that the Tax was designed as a means to provide treatment for sex offenders.[36] As noted by the Supreme Court in

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[35] *See, e.g.*, Hearing on H.B. 239 Before the H. Revenue & Taxation Standing Comm. (Feb. 3, 2004) (statement of Rep. Morgan Philpot) ("Why don't we take a stand whether it be through some form of task force that looks at this or just a bill that says this should be illegal? Because isn't that what we're really driving at here? . . . We're basically saying these are social ills. They're wrong. But we're not actually coming out and saying we're making it so, and is it because of the constitutional nature of that challenge . . . ?"); Senate Floor Debate, H.B. 239, 55th Utah Leg., Gen. Sess. (March 2, 2004) (statement of Sen. Mike Dmitrich) ("[T]his is a case where we're trying to put these businesses out of business.").

[36] *See, e.g.*, Hearing on H.B. 239 Before the H. Revenue & Taxation Standing Comm. (Feb. 3, 2004) (statement of Rep. Duane Bordeaux) ("I think, you know, to answer your question and to be very direct, well when you talk about the [moral] argument and are we trying to drive these out of business. They can open up ten more of these businesses, that's not my [mindset] here. Truly, the treatment side of it, I do think there's a contributing aspect of it that they can help pay. It's not to drive them out of business. . . ."); Senate Floor Debate, H.B. 239, 55th Utah Leg., Gen. Sess. (March 2, 2004) (statement of Sen. Howard Stephenson) ("We're not moralizing here in passing this

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O'Brien, in cases where a facially neutral statute is alleged to be content based because of statements found in the statute's legislative history, the reviewing court should be cautious in ascribing an impermissible motive to the enacting legislature:

> Inquiries into congressional motives or purposes are a hazardous matter. When the issue is simply the interpretation of legislation, the Court will look to statements by legislators for guidance as to the purpose of the legislature, because the benefit to sound decision-making in this circumstance is thought sufficient to risk the possibility of misreading Congress' purpose. It is an entirely different matter when we are asked to void a statute that is, under well-settled criteria, constitutional on its face, on the basis of what fewer than a handful of Congressmen said about it. What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork.[37]

The legislative record before us supports the conclusion that the predominant reason the Tax was

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tax. We're not trying to even reduce these [businesses'] income. What we're attempting to do is fund the secondary effects that are associated with these kinds of businesses and these kinds of activities.").

[37] *O'Brien*, 391 U.S. at 383-84.

enacted was to provide treatment for sex offenders, not to suppress protected expression.

¶ 20 Additionally, there is nothing in the text or structure of the Tax itself establishing that the legislature's predominant purpose in enacting the Tax was to suppress erotic nude dancing. The Tax is generally applicable; it applies to every business that employs nudity more than 30 days during the calendar year, regardless of whether that business employs nudity to convey an expressive message – erotic or otherwise.[38] Even if the burdens of the Tax, in practical effect, are likely to fall disproportionately on nude dancing clubs, the Tax is, in that regard, no different than the ordinance upheld in *Erie*. The major impact of the public nudity ordinance upheld in *Erie* surely fell upon businesses that employed nudity during their regular course of business. Yet this likely disparate impact was insufficient to render the ordinance content based.[39]

¶ 21 The only provision in the Tax that could be viewed as supporting the conclusion that the Tax was enacted with an intent to suppress erotic nude dancing is the 30-day exemption period.[40] One might

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[38] Utah Code Ann. § 59-27-102(4) (2008).

[39] *Erie*, 529 U.S. at 296.

[40] Utah Code Ann. § 59-27-102(4) (2008) (defining a sexually oriented business as one "at which any nude or partially denuded individual . . . performs any service . . . during at least 30 consecutive or nonconsecutive days within a calendar year").

view this exemption as evidence that the legislature intended to target nude dancing clubs – which are likely to feature erotic nude dancing on a consistent basis year round – over other businesses, such as theaters, that feature nudity only on an irregular basis. But this is only one interpretation of the purpose of the provision. One could also view the 30-day exemption period as an attempt to balance the state interest in providing sex offender treatment against the incidental burdens imposed on protected expression.[41]

¶ 22 Regardless of whether an intent to suppress protected expression can be inferred from the 30-day exemption period, any such inference is certainly less strong than the express statement found in the preamble of the *Erie* ordinance, which noted that the ordinance was prompted by concerns about an increase in nude live entertainment within the city.[42] The existence of this express statement in the

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[41] Contrary to the dissent's assertion, we have not construed the 30-day exemption as a balancing of interests. We only note that this is a legitimate view of the legislative purpose. And in light of this fact, we simply do not agree with the dissent's conclusion that the 30-day exemption establishes that the Tax's predominant purpose was the suppression of protected expression.

[42] *Pap's A.M. v. City of Erie*, 719 A.2d 273, 279 (Pa. 1998), *rev'd*, 529 U.S. 277 (2000). The dissent distinguishes this case from *Erie* based on the fact that the 30-day exemption is found in the Tax's text rather than in the preamble. But this is a distinction without a difference in the context of determining whether the Tax is content based. A statute is content based if it

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text of the *Erie* ordinance itself was an insufficient basis for the Supreme Court to conclude that the ordinance was content based.[43]

¶ 23 In light of the Supreme Court's treatment of the analogous issue in *Erie,* the mere possibility that *a purpose* of the Tax was to target nude dancing clubs is insufficient to render the Tax content based. The record before us indicates that the Tax's *predominant purpose* was providing treatment for sex offenders, not the suppression of protected expression. Because the Tax is facially content neutral and the record does not establish that the legislature enacted it with the predominant purpose of suppressing protected expression, it is a content-neutral regulation of speech that we analyze under the intermediate scrutiny test set out in *O'Brien.*

II. THE TAX PASSES INTERMEDIATE SCRUTINY UNDER *O'BRIEN*

¶ 24 As a content-neutral regulation of conduct that imposes incidental burdens on some protected expression, the Tax is constitutional so long as it passes intermediate scrutiny under the *O'Brien* test. Under *O'Brien,* a regulation of conduct is constitutional and must be upheld so long as: (1) it is within

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was enacted with the predominant purpose of suppressing protected expression. Such a purpose may be divined from a preamble just as readily as from a statute's text.

[43] *Erie,* 529 U.S. at 290-92.

the power of the legislature to enact; (2) it furthers a substantial government interest; (3) the government interest is unrelated to the suppression of protected expression; and (4) any incidental restrictions it imposes on protected expression are not greater than is essential to further the interest.[44]

¶ 25 As a threshold matter, it is important to differentiate between the *O'Brien* test for a regulation of conduct that imposes incidental burdens on some protected expression and the test for a regulation of speech that targets secondary effects.[45] Although both tests can be employed in situations that are factually similar,[46] they are two distinct tests directed at two different inquiries. The *O'Brien* incidental burdens test applies to regulations of conduct that are content neutral both on their face and as to purpose. The *Renton* secondary effects analysis applies to regulations of speech that are content based on their face but are asserted to be content neutral as to purpose. And, in a case like this one, where the parties' arguments implicate both *O'Brien* and the secondary

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[44] *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

[45] *See, e.g., City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986); *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002).

[46] *See, e.g., Erie*, 529 U.S. 277 (2000) (employing *O'Brien's* incidental burdens analysis); *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002) (employing secondary effects analysis).

effects analyses, understanding the distinctions between the tests is key to reaching the correct result.

¶ 26 As set forth by the Supreme Court, the intermediate scrutiny test from *O'Brien* applies when the regulation at issue regulates *conduct*, but the "course of conduct" to which the regulation applies contains both "'speech' and 'nonspeech' elements."[47] In other words, the *O'Brien* test applies to statutes that regulate conduct but that include within their reach both expressive and nonexpressive conduct. The *O'Brien* inquiry is directed toward determining whether "a sufficiently important governmental interest in regulating [conduct] can justify incidental limitations on First Amendment freedoms."[48]

¶ 27 The secondary effects analysis, on the other hand, is appropriate when the regulation at issue is content based, i.e. is directed at *speech* rather than conduct, but is justified with reference to the secondary effects associated with the speech rather than the communicative content of the speech itself.[49]

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[47] *O'Brien*, 391 U.S. at 376.

[48] *Id.*

[49] *See Alameda Books*, 535 U.S. at 440-41 (noting that the purposes of the secondary effects analysis are to "require [] courts to verify that the 'predominate concerns' motivating the ordinance 'were with the secondary effects of adult [speech], and not with the content of adult [speech]' . . . [and to] ask whether the municipality can demonstrate a connection between the speech regulated by the ordinance and the secondary effects that motivated the adoption of the ordinance." (quoting *Renton*, 475

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¶ 28 The difference in objectives between the incidental burdens and secondary effects analyses is readily apparent. Whereas the *O'Brien* incidental burdens test is designed simply to ensure that a neutral, nontargeted regulation of conduct does not place impermissibly heavy burdens on protected expression, the inquiry in secondary effects cases is directed, at least in part, toward assessing the motive behind a facially content-based regulation of speech. When a law, on its face, regulates protected expression differently based on its content, there is a presumption that the law's purpose is to target certain speech based on its content or communicative impact.[50] In such a case, the reviewing court employs the secondary effects analysis to ensure that the expressed interest in regulating secondary effects is the

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U.S. at 47)); *see also R.V.S., L.L.C. v. City of Rockford*, 361 F.3d 402, 407 (7th Cir. 2004) ("Whatever the label, *Renton's* second step is best conceived as an inquiry into the purpose behind an ordinance rather than an evaluation of an ordinance's form.").

[50] *Schultz v. City of Cumberland*, 228 F.3d 831, 840 (7th Cir. 2000) ("Content-based regulations by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed. Since it is the content of the speech that determines whether it is within or without the [regulation], they single out certain viewpoints or subject matter for differential treatment. These regulations draw strict scrutiny because their purpose is typically related to the suppression of free expression and thus contrary to the First Amendment imperative against government discrimination based on viewpoint or subject matter." (alteration in original) (citations and internal quotation marks omitted)).

real motivation behind the challenged statute.[51] In contrast, there is no need, when applying the incidental burdens analysis, to evaluate the expressed interest because the determination that the regulation does not target the content of protected expression has already been made – by virtue of declaring the regulation content neutral.

¶ 29 Having set out the distinct purposes of the *O'Brien* incidental burdens analysis and the secondary effects analysis, and having determined that *O'Brien* provides the correct framework of analysis, we now analyze whether the Tax passes intermediate scrutiny under *O'Brien*.

A. The Tax Is Within the Legislature's Power to Enact

¶ 30 The Tax satisfies the first prong of the *O'Brien* analysis because it is beyond question that the legislature has the authority to enact a tax to raise revenue. The Utah State Constitution expressly grants the legislature plenary authority over taxation.[52] Thus, the Tax is within the power of the legislature to enact and meets the first prong of the *O'Brien* test.

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[51] *Alameda Books*, 535 U.S. at 440-41.

[52] Utah Const. art. XIII, § 4, cl. 1.

B. The Tax Furthers the Substantial State Interest of Providing Treatment for Sex Offenders and Thereby Preventing Future Offenses

¶ 31 As to the second prong, we conclude that the Tax furthers a substantial government interest. While Plaintiffs acknowledge that providing treatment for sex offenders is an important government interest, they claim that the Tax fails to satisfy the second prong of the *O'Brien* test for two reasons: (1) there is not sufficient evidence supporting a connection between nude dancing establishments and sex offenders; and even if a sufficient connection did exist, (2) the Tax impermissibly attempts to address the "primary," rather than "secondary," effects of nude dancing.

¶ 32 Plaintiffs' objections regarding the lack of evidentiary connection are misplaced because they are based on the requirements of the secondary effects test rather than the *O'Brien* test. While Plaintiffs are correct in noting that the Supreme Court, in construing the "substantial state interest" prong under *Renton* and its other secondary effects cases, has required parties seeking to justify a regulation of speech under the secondary effects doctrine to establish some level of evidentiary connection between the secondary effects a regulation targets and the speech

it regulates, no similar burden of proof exists under the *O'Brien* test.[53]

¶ 33 As set forth above, the evidentiary connection requirement for secondary effects regulations exists to provide assurance that the regulation was actually motivated by the asserted concerns over secondary effects rather than by the content of the speech itself. A review of the relevant case law shows that the second prong of the *O'Brien* test does not require that the state provide evidentiary proof of a connection between the speech it regulates and

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[53] *Compare Alameda Books*, 535 U.S. at 437 ("[T]he city certainly bears the burden of providing evidence that supports a link between concentrations of adult operations and asserted secondary effects. . . .") *with Erie*, 529 U.S. at 298-99 ("Finally, it is worth repeating that Erie's ordinance is on its face a content neutral restriction that regulates conduct, not First Amendment expression. . . . On this point, *O'Brien* is especially instructive. The Court there did not require evidence that the integrity of the Selective Service System would be jeopardized by the knowing destruction and mutilation of draft cards. . . . There was no study documenting instances of draft card mutilation or the actual effect of such mutilation on the Government's asserted efficiency interests. But the Court permitted Congress to take official notice, as it were, that draft card destruction would jeopardize the system. The fact that this sort of leeway is appropriate in a case involving conduct says nothing whatsoever about its appropriateness in a case involving actual regulation of First Amendment expression. As we have said, so long as the regulation is unrelated to the suppression of expression, the government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word." (internal citation and quotation marks omitted)).

secondary effects.[54] Instead, all that is required is that the state show its regulation would advance a substantial state interest. The requirement that the interest be "substantial" simply ensures that the state's interest in adopting the legislation is sufficiently weighty to justify the incidental burdens that the regulation may place on some protected expression.[55]

¶ 34 Plaintiffs' arguments relating to primary effects are misplaced for a similar reason. The primary effects of speech are the direct impacts that the speech has upon the listener or viewer – such as a change in attitude or an increased motivation to engage in certain behavior. The secondary effects of speech, on the other hand, are indirect effects associated with the speech. Secondary effects do not operate on the listener but on something else, such as the neighborhood surrounding the location where the speech occurs.[56] Plaintiffs contend that the Tax should be subject to strict scrutiny because the State has

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[54] *See, e.g., Erie*, 529 U.S. at 298-99.

[55] *O'Brien*, 391 U.S. at 376.

[56] *Alameda Books*, 535 U.S. at 444 (Kennedy, J., concurring) ("Speech can produce tangible consequences: It can change minds. It can prompt actions. These primary effects signify the power and the necessity of free speech. Speech can also cause secondary effects, however, unrelated to the impact of the speech on its audience. A newspaper factory may cause pollution, and a billboard may obstruct a view. These secondary consequences are not always immune from regulation by zoning laws even though they are produced by speech.").

failed to justify the Tax by reference to secondary effects. Plaintiffs claim that the State has offered only the argument that people who view erotic nude dancing are more likely to commit sex offenses. Plaintiffs contend that, even if the State's assertion is true, such an effect is a primary, rather than secondary, effect of erotic nude dancing since it operates, if at all, through the impact that watching erotic nude dancing has on the viewer. Plaintiffs' argument is wholly misplaced because the distinction between primary and secondary effects of speech is only relevant when a court is evaluating the constitutionality of a content-based regulation of speech. The *O'Brien* analysis assumes the evaluated regulation will impose some burden on protected expression, which inevitably results in a burden on the primary effects of that protected expression. The whole point of the *O'Brien* analysis is to determine whether that burden is acceptable in light of the government's asserted interest in enacting the regulation. Thus, even assuming that Plaintiffs' distinction regarding primary and secondary effects is correct, this fact is irrelevant in the context of a content-neutral regulation of conduct, like the Tax, that is reviewed under *O'Brien*.

¶ 35 Finally, the mere fact that the State has referenced secondary effects as a justification for its conduct-based Tax does not convert the Tax from a content-neutral regulation of conduct into a content-based regulation of speech. In his *Erie* dissent, Justice Stevens argued that, where a government

seeks to justify a regulation of conduct based, in part, on secondary effects, the regulation should be treated as a content-based regulation of speech and subjected to the secondary effects analysis:

> The Court cannot have its cake and eat it too – either Erie's ordinance was not aimed at speech and the Court may attempt to justify the regulation under the incidental burdens test, or Erie has aimed its law at the secondary effects of speech, and the Court can try to justify the law under that doctrine. But it cannot conflate the two with the expectation that Erie's interests aimed at secondary effects will be rendered unrelated to speech by virtue of this doctrinal polyglot.[57]

The plurality rejected Justice Stevens's argument, noting that

> While the doctrinal theories behind "incidental burdens" and "secondary effects" are, of course, not identical, there is nothing objectionable about a city passing a general ordinance to ban public nudity (even though such a ban may place incidental burdens on some protected speech) and at the same time recognizing that one specific occurrence of public nudity – nude erotic dancing – is

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[57] *Erie*, 529 U.S. at 326 (Stevens, J., dissenting).

> particularly problematic because it produces harmful secondary effects.[58]

In other words, the mere fact that, in debating the Tax, legislators referenced concerns with the secondary effects associated with nudity in business does not necessarily mean – without more – that the Tax constitutes a content-based regulation of speech that must be justified either under the secondary effects doctrine or traditional strict scrutiny. The key consideration is whether the statute seeks to suppress *speech* or regulate *conduct* – not whether concerns about secondary effects played some motivational role in its enactment.

¶ 36 In this case, the record supports the conclusion that the Tax is directed toward the substantial state interest of providing treatment for sex offenders, with the twin goals of rehabilitation and prevention of future offenses. It is also clear that the Tax furthers that interest by raising revenue that is specifically directed toward sex offender treatment programs.[59] Because the Tax furthers a substantial state interest,[60] we conclude that it satisfies the second prong of the *O'Brien* test.

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[58] *Id.* at 295.

[59] The Tax specifically applies a portion of the revenue raised to treatment of sex offenders through the Department of Corrections. *See* Utah Code Ann. § 59-27-105 (2008).

[60] Plaintiffs point out that the tax may not *substantially further* the interest in treating sex offenders, but this is not the requirement. *O'Brien* only requires that a content-neutral

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C. Providing Treatment for Sex Offenders Is a Government Interest Unrelated to the Suppression of Protected Expression

¶ 37 The Tax also satisfies the third prong of the *O'Brien* test – the requirement that the government interest be unrelated to the suppression of protected expression. Under Supreme Court case law, it is clear that a regulation satisfies this prong of *O'Brien* so long as its predominant purpose is not the suppression of protected expression.[61] The record before us supports the conclusion that the predominant government interest precipitating passage of the Tax was the need to provide treatment for sex offenders. This interest is unrelated to any attempt to suppress speech; indeed, as set out above, any impacts on protected speech are incidental burdens associated with the Tax's application to a general class of conduct.

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regulation of conduct *further* the state's substantial interest. *Erie*, 529 U.S. at 301 ("To be sure, requiring dancers to wear pasties and G-strings may not greatly reduce these secondary effects, but *O'Brien* requires only that the regulation further the interest in combating such effects."). The Tax would clearly do that here, even if the actual amount of revenue raised is small.

[61] *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 49 (1986) (noting that a determination that a statute's "'predominate'" intent was to limit negative secondary effects was "more than adequate to establish" that the government's interest was "unrelated to the suppression of free expression"); *see also Erie*, 529 U.S. at 292.

D. The Tax Is Narrowly Tailored Because It Leaves Open Alternative Means of Conveying the Erotic Message and Any Burdens It Places on Speech Are De Minimis

¶ 38 Finally, the Tax satisfies the fourth prong of the *O'Brien* test as well, in that the burdens that the Tax places on protected expression are no greater than necessary. Although the Supreme Court's use of the "no greater than necessary" language in *O'Brien* appears similar to the "least restrictive means" requirement for strict scrutiny, the Court has made clear that this prong does not require the state to show that its chosen means for advancing the substantial state interest is the least restrictive means available.[62] Instead, the fourth prong of the *O'Brien* test imposes only a requirement that the regulation be "narrowly tailored," in the sense that it "promote[ ] a substantial government interest that would be achieved less effectively absent the regulation."[63] De minimis impacts on protected speech are permissible.[64]

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[62] *Erie*, 529 U.S. at 301 ("In any event, since this is a content-neutral restriction, least restrictive means analysis is not required."); *see also Ward v Rock Against Racism*, 491 U.S. 781, 798 n.6 (1989) (stating that "least-restrictive-alternative analysis is wholly out of place" when evaluating content-neutral regulations of speech).

[63] *United States v. Albertini*, 472 U.S. 675, 689 (1985).

[64] *Erie*, 529 U.S. at 301.

¶ 39 Plaintiffs argue that the Tax fails this prong because there are less burdensome ways of addressing the state's interest in providing treatment for sex offenders and that the First Amendment requires that these methods, rather than the Tax, be used.

¶ 40 To begin with, Plaintiffs' argument suggests that *O'Brien* requires a regulation of conduct placing incidental burdens on some protected expression to use the least restrictive means available to serve the state's asserted interest. The Supreme Court has expressly rejected that formulation of the *O'Brien* test.[65] Additionally, Plaintiffs' least restrictive means argument is contrary to its own position that a general tax – one that burdens all businesses – would satisfy First Amendment scrutiny under *O'Brien*. A generalized tax would no doubt inflict burdens on a greater variety of protected expression than the Tax at issue here, and therefore would not be the least restrictive means available. The Supreme Court's cases have made clear that the fourth prong of *O'Brien* is satisfied so long as a content-neutral regulation "promotes a substantial government interest that would be achieved less effectively absent the regulation."[66] Further, de minimis impacts on protected expression are permissible.[67]

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[65] *Id.*

[66] *Albertini*, 472 U.S. at 689.

[67] *Erie*, 529 U.S. at 301.

¶ 41 In this case, the Tax promotes the interest in providing treatment for sex offenders by raising revenue and directing that revenue towards treatment programs. While there may be other, less speech-restrictive means of accomplishing the interest, the Tax is not "invalid simply because there is some imaginable alternative that might be less burdensome on speech."[68] "The validity of [content neutral regulations of conduct] does not turn on a judge's agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests."[69]

¶ 42 Additionally, any burdens the Tax imposes on protected expression are de minimis. Indeed, the Tax burdens protected expression substantially less than the public nudity ordinance upheld by the Supreme Court in *Erie*. The *Erie* ordinance imposed a blanket ban on nudity in public. The Supreme Court noted that the public nudity ban's burden on nude dancing was de minimis, since all the dancers had to do to avoid the ban was to wear G-strings and pasties.[70] The ordinance left nude dancers "ample capacity to convey [their] erotic message"[71] and only

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[68] *Albertini*, 472 U.S. at 689.

[69] *Id.*

[70] *Erie*, 529 U.S. at 301.

[71] *Id.*

limited whatever expression that might occur "when the last stitch is dropped."[72]

¶ 43 Plaintiffs can avoid the Tax, just like the businesses in *Erie* could avoid the ordinance, simply by having their erotic dancers use G-strings and pasties. Additionally, the Tax places less of a burden on protected expression than the ordinance upheld in *Erie* in two ways. First, in contrast to the *Erie* ordinance, which banned all public nudity under threat of *criminal* sanctions,[73] the Tax neither prohibits public nudity nor imposes criminal penalties – it simply imposes an additional cost on the commercial use of nudity as a method of expression. Secondly, the 30-day exemption period further limits the Tax's burden on protected expression. The exemption period allows businesses to use nudity as a means of expression for up to 30 days each calendar year without being subject to the Tax. Since the Tax's impact on protected expression is even less burdensome than the impact of the public nudity ordinance upheld in *Erie*, we determine that the Tax satisfies the "narrow tailoring" prong of the *O'Brien* test.

¶ 44 We are unpersuaded by Plaintiffs' citation to cases such as *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*[74] and *Arkansas*

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[72] *Id.* at 294.

[73] *Pap's A.M. v. City of Erie*, 719 A.2d 273, 275-76 (Pa. 1998), *rev'd*, 529 U.S. 277 (2000).

[74] 460 U.S. 575 (1983).

Writers' Project, Inc. v. Ragland[75] for the proposition that First Amendment rights may not be taxed. To begin with, as set out above, the Tax is, on its face, a regulation of conduct. The Tax is thus meaningfully distinguishable from those struck down in *Minneapolis Star* and *Arkansas Writers' Project*, which were content-based regulations of speech.[76]

¶ 45 Additionally, neither *Minneapolis Star* nor *Arkansas Writers' Project* actually stand for the blanket proposition that a tax, whether general or differential, can never burden protected First Amendment expression. Instead, they simply confirm the already well-established rule that content-based regulations of speech are presumptively unconstitutional.[77] They also evidence an understandable concern for regulations that directly implicate the freedom of the press.[78] This is made clear by *Leathers v. Medlock*, in which the Supreme Court, in distinguishing that case from *Minneapolis Star* and *Arkansas Writers' Project*, clarified that a tax scheme that does not target specific ideas or viewpoints on its face, and that is not structured or enacted in order to

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[75] 481 U.S. 221 (1987).

[76] *Leathers v. Medlock*, 499 U.S. 439, 445-47 (1991).

[77] *See Leathers*, 499 U.S. at 447 (stating that *Minneapolis Star* and *Arkansas Writers' Project* "demonstrate that differential taxation of First Amendment speakers is constitutionally suspect when it threatens to suppress the expression of particular ideas or viewpoints").

[78] *See, e.g., Minneapolis Star*, 460 U.S. at 585.

impose "a penalty for particular speakers or particular ideas," does not necessarily run afoul of the First Amendment.[79] As set out above, the Tax is neither facially discriminatory nor does the record or the Tax's structure establish that it was enacted with the predominant purpose of suppressing protected expression.

¶ 46 Finally, the taxes in *Minneapolis Star* and *Arkansas Writers' Project* were sales and use taxes imposed on the necessary materials for newspaper publishing and sales of magazines, respectively. The affected publishers could not avoid paying the taxes if they wanted to continue to operate as newspapers and magazines.[80] In contrast, Plaintiffs, and other erotic dancing clubs, can avoid the Tax and continue to operate as erotic dance clubs simply by requiring their dancers to use G-Strings and pasties. The effect on the erotic message is minimal. The Tax simply imposes a cost on using a particular means of expression rather than on the expression itself – a distinction that the Supreme Court has expressly acknowledged as significant in *Erie*.[81]

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[79] *Leathers*, 499 U.S. at 449.

[80] *See Minneapolis Star*, 460 U.S. at 577 (large circulation newspaper subjected to a use tax on the cost of paper and ink products used for publication); *Arkansas Writers' Project*, 481 U.S. at 224 (sales tax imposed on small group of nonexempt magazines).

[81] *Erie*, 529 U.S. at 292-93.

¶ 47 Accordingly, we conclude that the Tax is narrowly tailored and that it satisfies the fourth prong of the *O'Brien* test. Having determined that the Tax is a content-neutral regulation of conduct that passes the *O'Brien* test, we now turn to Plaintiffs' argument that the tax is unconstitutionally overbroad.

III. THE TAX IS NOT UNCONSTITUTIONALLY OVERBROAD BECAUSE IT DOES NOT PROHIBIT A SUBSTANTIAL AMOUNT OF PROTECTED EXPRESSION

¶ 48 In addition to arguing that the Tax is unconstitutional under traditional First Amendment analysis, Plaintiffs contend that the Tax is facially unconstitutional because it is overbroad. The Supreme Court's overbreadth doctrine recognizes that a regulation that "punishes a 'substantial' amount of protected speech, 'judged in relation to the statute's plainly legitimate sweep,'" is unconstitutional on its face.[82] The overbreadth doctrine allows a plaintiff to mount a facial challenge to a statute, even if the statute, as applied to that plaintiff, is constitutional. In other words, it enables a plaintiff to challenge a

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[82] *Virginia v. Hicks*, 539 U.S. 113, 118-19 (2003) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)).

statute based on how it impacts the rights of parties not before the court.[83]

¶ 49 The purpose of the overbreadth doctrine is to ensure that First Amendment rights are not impermissibly chilled by an overbroad statute.[84] Even though the person against whom an overbroad statute is enforced always has the right to mount an "as applied" constitutional challenge, the Supreme Court has justified the existence of the overbreadth doctrine on the ground that such a person may be reluctant to assert his First Amendment rights due to the cost of litigation and the potential for enforcement sanctions.[85]

¶ 50 Nevertheless, despite its important role in providing a remedy to ensure that First Amendment

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[83] *Los Angeles Police Dep't v. United Reporting Publ'g Corp.*, 528 U.S. 32, 39 (1999) ("[T]he allowance of a facial overbreadth challenge to a statute is an exception to the traditional rule that 'the person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court.'" (quoting *New York v. Ferber*, 458 U.S. 747, 767 (1982))).

[84] *Hicks*, 539 U.S. at 119 (2003) ("We have provided this expansive remedy out of concern that the threat of enforcement of an overbroad law may deter or 'chill' constitutionally protected speech – especially when the overbroad statute imposes criminal sanctions. Many persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech." (internal citations omitted)).

[85] *Id.*

rights are not impermissibly chilled, the overbreadth doctrine is "strong medicine"[86] that "suffices to invalidate *all* enforcement of the law,"[87] whether legitimate or not, and the Supreme Court has cautioned against its being "casually employed."[88] "[T]here comes a point at which the chilling effect of an overbroad law, significant though it may be, cannot justify prohibiting all enforcement of that law – particularly a law that reflects legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct."[89] The key mechanism by which the Court has prevented overuse of the overbreadth doctrine is "vigorous[ ] enforce[ment] [of] the requirement that a statute's overbreadth be *substantial*, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep."[90]

¶ 51 The Tax, as set out above, is narrowly tailored and, therefore, is not substantially overbroad. To begin with, the Tax regulates conduct rather than expression. The Supreme Court has stated that "[r]arely, if ever, will an overbreadth challenge succeed against a law or regulation that is

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[86] *United States v. Williams*, 128 S. Ct. 1830, 1838 (2008) (internal quotation marks omitted).

[87] *Hicks*, 539 U.S. at 119 (emphasis in original).

[88] *Williams*, 128 S. Ct. at 1838 (internal quotation marks omitted).

[89] *Hicks*, 539 U.S. at 119 (internal quotation marks omitted).

[90] *Williams*, 128 S. Ct. at 1838 (emphasis in original).

not specifically addressed to speech or conduct necessarily associated with speech (such as picketing or demonstrating)."[91] As described above, the Tax is a content-neutral regulation of noninherently expressive conduct and therefore falls within this class of cases.

¶ 52 Additionally, the Tax is narrowly drawn in that it is directed toward a means of expression rather than expression itself. It does not prohibit the expression of any message; it simply imposes a cost on using a particular means of expressing a viewpoint – whatever the viewpoint may be.

¶ 53 Finally, the 30-day exemption period further limits the Tax's impact on protected expression. As a result, regardless of whether the Tax impacts protected expression in theater productions and nude dancing clubs, its impact on protected expression is de minimis rather than substantial. For this reason, we conclude that the Tax is not unconstitutionally overbroad.

IV. THE STATUTORY PROVISIONS APPLYING THE TAX TO ESCORT SERVICES ARE UNCONSTITUTIONALLY VAGUE

¶ 54 In order to be unconstitutionally vague, a statute must either (1) fail to "give the person of ordinary intelligence a reasonable opportunity to know

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[91] *Hicks*, 539 U.S. at 124.

what is prohibited, so that he may act accordingly,"[92] or (2) be written in a way that encourages arbitrary and discriminatory enforcement.[93] As the primary trigger for applying the Tax to escort services, the term "escort" is defined in the Tax in a way that fails to provide relatively clear guidelines regarding what conduct is subject to the Tax. Accordingly, we determine that the statutory provisions applying the Tax to escort services are unconstitutionally vague.

¶ 55 The escort services provisions of the Tax are vague for the reasons enunciated by the United States Supreme Court in *City of Chicago v. Morales.* In *Morales,* the Court held that an ordinance prohibiting loitering was unconstitutionally vague when the ordinance defined "loitering" as "remain[ing] in any one place with no apparent purpose."[94] Reasoning that the City of Chicago could not "conceivably have meant to criminalize each instance a citizen stands in public,"[95] the Court concluded that the ordinance was impermissibly vague because it failed to adequately distinguish what "loitering is covered by the ordinance and what is not."[96]

¶ 56 Like the loitering ordinance in *Morales,* the statutory provisions applying the Tax to escort

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[92] *Grayned v. City of Rockford,* 408 U.S. 104, 108 (1972).

[93] *City of Chicago v. Morales,* 527 U.S. 41, 56 (1999).

[94] *Id.* at 57.

[95] *Id.*

[96] *Id.*

services fail to provide a person of ordinary intelligence guidance as to what conduct will trigger the Tax and what conduct will not. The Tax defines an "escort" as anyone who accompanies another for compensated companionship.[97] Nowhere does the statute define an escort in terms of nudity. The statute also fails to define the term "companionship." Therefore, according to the plain terms of the statute, individuals who are paid for providing care for the elderly as well as those who are paid as tour guides would fall within the definition of an "escort," and any person or business who employs them would be subject to the Tax.

¶ 57 The legislature could not conceivably have intended that companions for the elderly and tour guides would be subject to the Sexually Explicit Business and Escort Services tax. Yet, like the ordinance struck down in *Morales*, the Tax fails to provide adequate information for a person of ordinary intelligence to distinguish between those types of compensated companionship that the legislature intended would trigger application of the Tax and those that it intended would not. This ambiguity also permits arbitrary enforcement by the Commission. Accordingly,

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[97] Utah Code Ann. § 59-27-102(1) (2008) ("'Escort' means any individual who is available to the public for the purpose of accompanying another individual for: . . . companionship[,] . . . a salary[,] . . . a fee [,] . . . a commission[,] . . . hire[,] . . . profit, . . . or . . . any amount similar to an amount listed in this Subsection.").

we hold that the provisions of the statute applying the tax to escort services are unconstitutionally vague.

CONCLUSION

¶ 58 We uphold the district court's determination that the Tax is constitutional as a content-neutral regulation of conduct that satisfies the *O'Brien* incidental burdens test. We also hold that it is not unconstitutionally overbroad because it does not prohibit a substantial amount of protected speech. Finally, we determine that the statutory provisions applying the Tax to escort services are unconstitutionally vague.

¶ 59 Justice Wilkins, Justice Parrish, and Judge Orme concur in Associate Chief Justice Durrant's opinion.

¶ 60 Justice Nehring does not participate herein; Court of Appeals Judge Gregory K. Orme sat.

DURHAM, Chief Justice, dissenting in part and concurring in part:

¶ 61 I respectfully dissent in part and concur in part. I agree with the majority's analysis in Part IV

that the escort and companionship provisions of the Sexually Explicit Business and Escort Service Tax (the Tax) are unconstitutionally vague. I, however, do not agree with the majority's conclusion that the Tax is content neutral and thus subject to intermediate scrutiny.

¶ 62 Despite the majority's efforts to demonstrate otherwise, this case is not the same as *Erie*. Rather, the Utah Legislature has enacted a statute that, by its own terms, makes it a content-based tax on First Amendment expressive speech; hence strict scrutiny should apply. Because the Utah State Tax Commission (the Commission) cannot show that the Tax is necessary to serve a compelling state interest and is narrowly tailored to that end, I would hold that the Tax violates the First Amendment to the United States Constitution.

I. UNLIKE THE ORDINANCE IN *ERIE*, THE STATUTE BY ITS OWN TERMS STRATEGICALLY TAXES PROTECTED EXPRESSION AND IS THEREFORE A CONTENT-BASED TAX

¶ 63 The Tax imposes a ten percent gross receipts tax on sexually explicit businesses. Utah Code Ann. § 59-27-103 (2008). It defines a sexually explicit business as "a business at which any nude or partially denuded individual . . . performs any service . . . on the premises of the sexually explicit business . . . during at least 30 consecutive or nonconsecutive days

within a calendar year" for profit or compensation. *Id.* § 59-27-102(4).

¶ 64 Both parties agree that the nudity at issue, nude dancing, is afforded some First Amendment protection. Plaintiffs argue that the Tax is a content-based burden subject to strict scrutiny. The Commission contends that the Tax is aimed at secondary effects and is thus subject to intermediate scrutiny. Plaintiffs are correct.

¶ 65 The First Amendment to the United States Constitution protects artistic expression, which includes nude dancing. In *Barnes v. Glen Theatre, Inc.*, the Supreme Court of the United States concluded, by way of plurality, that nude dancing is entitled to some level of First Amendment protection. 501 U.S. 560, 566 (1991) (Rehnquist, C.J., O'Connor, J., and Kennedy, J., plurality) ("[N]ude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment. . . ."); *id.* at 581 (Souter, J., concurring) ("[A]n interest in freely engaging in the nude dancing at issue here is subject to a degree of First Amendment protection."); *id.* at 592 (White, J., Marshall, J., Blackmun, J., and Stevens J., dissenting) ("The nudity is itself an expressive component of the dance. . . .").

¶ 66 This First Amendment protection of nude dancing is clear. It does not dissipate in the face of majority opinion or government decree. *See United States v. Playboy Entm't Group,* 529 U.S. 803, 818

(2000). Nor is it lessened because the expression is "not very important," "shabby, offensive, or even ugly." *Id.* at 826. Indeed, "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson,* 491 U.S. 397, 414 (1989).

¶ 67 Because nude dancing is protected expression, a regulation that burdens such expression by reference to its content is a content-based regulation. *See R.A.V. v. City of St. Paul,* 505 U.S. 377, 382 (1992). For example, in *Playboy Entertainment,* the Court evaluated a statute designed to restrict children's viewing of sexually explicit programming. 529 U.S. at 806-10. The Court determined that "[t]he speech in question is defined by its content; and the statute which seeks to restrict it is content-based." 529 U.S. at 811. The statute "is not justified without reference to the content of the regulated speech." *Id.* (internal quotation marks omitted). "It focuses only on the content of the speech and the direct impact that speech has on its listeners." *Id.* (internal quotation marks omitted).

¶ 68 The Tax is a content-based regulation. It applies solely based on the narrow content of the business activity, namely, whether it involves nudity. While the Commission argues that the Tax could be applied conceptually to any type of business, this purported expansive reach does not make it content neutral. Just the opposite is true: it applies to exotic

dancing but not to traditional ballet, an art exhibit, or a theatrical performance. In short, it is the content of expression that triggers the Tax.

¶ 69 Further, the Tax cannot be considered content neutral in spite of the majority's heavy reliance on *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000). While the plurality in that case found the ordinance *banning all public nudity* to be content neutral, it did so according to the general applicability of the terms of the ordinance. *Id.* at 290; *id.* at 307-08 (Scalia, J., concurring). That ordinance, "[b]y its terms . . . regulates conduct alone. *It does not target nudity that contains an erotic message;* rather, *it bans all public nudity,* regardless of whether that nudity is accompanied by expressive activity." *Id.* at 290 (emphases added).

¶ 70 The Tax, in contrast, by its terms, creates a strategic burden by limiting its application to those "sexually explicit businesses" at which nude or partially nude employees perform "during at least 30 consecutive or nonconsecutive days within a calendar year." Utah Code Ann. § 59-27-102(4)(b) (2008). Meanwhile, other businesses, such as theaters, art galleries, or dance companies, are allowed to continue their expressive activity without disruption.

¶ 71 The majority discounts this thirty-day trigger as analogous to the preamble in *Erie*, which Chief Justice Rehnquist, Justice O'Connor, Justice Kennedy, and Justice Breyer regarded as the mere expression of the city council without any legal effect

and which could be construed to combat the negative secondary effects listed within the preamble. *See* 529 U.S. at 290-91. But here it is the text of the law itself, not a preamble, that contains the thirty-day limitation and thereby, as its title and terms indicate, targets "sexually explicit businesses." And, despite the majority's attempt to characterize this case as a carbon copy of *Erie,* there is no other reasonable interpretation of the thirty-day limitation. Unlike the preamble in *Erie,* the text of the law does not identify any secondary effects nor does it support, as the majority construes it, a balancing of "the state interest in providing sex offender treatment against the incidental burdens imposed on protected expression." Therefore, this case is not like *Erie,* where "[t]here [was] no basis for the contention that the ordinance d[id] not apply to nudity in theatrical productions such as Equus or Hair" because the ordinance's "text contain[ed] no such limitation." *Id.* at 308 (Scalia, J., concurring). Rather, the thirty-day limitation found in the text of the Tax makes it a content-based tax.

¶ 72 Indeed, if the Tax were truly content neutral, it would resemble the tax analyzed by the Colorado Court of Appeals in *Cinamerica Theatres, L.P. v. City of Boulder,* 50 P.3d 921 (Colo. Ct. App. 2002). That tax "applies to all places or events . . . regardless whether the activity involves protected speech and regardless of content," and taxes businesses and events "as diverse as Broadway-style dinner theater, live striptease and nude dancing, music concerts and live performances, theatrical performances,

radio shows, ballet performances, dance parties, fund-raising events, bars and nightclubs, and foot races." *Id.* at 926, 928-29. Such a tax "does not affect a limited range of views and does not threaten to suppress the expression of particular ideas or viewpoints." *Id.* at 929. (internal quotation marks and alteration omitted).

¶ 73 Instead, the Tax before us treats businesses differently in reference to the content of the expression involved and does so under the guise of a thirty-day "limitation," or in other words, a de facto exemption for the more accepted forms of expression involving nudity. As Justice Kennedy explained in his concurrence in *City of Los Angeles v. Alameda Books, Inc.*, "[T]he ordinance in *Renton* treat[ed] theaters that specialize in adult films differently from other kinds of theaters. The fiction that this sort of ordinance is content neutral – or 'content neutral' – is perhaps more confusing than helpful. . . . These ordinances are content based and we should call them so." 535 U.S. 425, 448 (2002) (second alteration in original) (internal quotation marks and citations omitted).

¶ 74 Therefore, despite the majority's analysis of the Tax under *Erie*, and without resort to the statements made by legislators in enacting the Tax, the Tax is not one of general applicability that regulates conduct alone. Rather, the Tax, by its terms, targets sexually explicit businesses that feature for thirty or more days per year the constitutionally protected expressive activity of nude dancing. Because it

does so, I would hold that the Tax is content based and thus subject to strict scrutiny.

II. THE SECONDARY EFFECTS DOCTRINE DOES NOT APPLY TO SAVE THE CONTENT-BASED TAX FROM STRICT SCRUTINY

¶ 75 Because the Tax regulates expression "based on its content, it must be narrowly tailored to promote a compelling Government interest." *United States v. Playboy Entm't Group*, 529 U.S. 803, 813 (2000). The Commission, however, argues that the Tax's constitutionality should be evaluated under intermediate scrutiny because it regulates based on negative secondary effects. However, the doctrine of secondary effects does not apply. The sole secondary effect the Commission identifies is sex offenses. This effect, however, lacks any empirical, reasonable connection to the viewing of nudity, which consequently makes the Tax a reaction to a primary effect.

¶ 76 Used as a time, place, and manner restriction on speech, the secondary effects doctrine has been invoked to uphold both the zoning and prohibition of nude dancing. *See City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46-47 (1986). In applying the secondary effects doctrine, a court must verify that (1) "'the predominate concerns' motivating the ordinance 'were with the secondary effects of adult [speech], and not with the content of adult [speech],'" and that (2) "a connection [exists] between the speech regulated by the ordinance and the

secondary effects that motivated the adoption of the ordinance." *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 440-41 (2002) (quoting *Renton*, 475 U.S. at 47). The burden of proving secondary effects lies with the government. *Doctor John's v. Wahlen*, 542 F.3d 787, 789 (10th Cir. 2008). Examples of secondary effects include, "providing an atmosphere conducive to violence, sexual harassment, public intoxication, prostitution, the spread of sexually transmitted diseases and other deleterious effects," *Erie*, 529 U.S. at 290; "effects . . . on the surrounding community, namely . . . crime rates, property values, and the quality of the city's neighborhoods," *Alameda Books*, 535 U.S. at 434; and "unsanitary conditions, unlawful sexual activity, and the transmission of sexually transmitted diseases," *Heideman v. S. Salt Lake City*, 165 Fed. Appx. 627, 631 (10th Cir. 2006).

¶ 77 Despite the Commission's arguments to the contrary, it has failed to identify *any* secondary effect that the Tax is designed to regulate. There is no concern about property values, crime, prostitution, sexually transmitted diseases, public intoxication, or other secondary effects in the neighborhoods surrounding the businesses. All the Commission argues is the effect on sex offenders "in general," without the benefit of any data identifying or establishing such effects. Moreover, the Commission does not claim that the sex offenders' crimes were connected in some way to the neighborhoods surrounding the businesses being taxed.

¶ 78 In *Ashcroft v. Free Speech Coalition*, the Supreme Court of the United States considered the constitutionality of a prohibition on virtual images of child pornography. 535 U.S. 234 (2002). The government had provided some evidence that individuals who view such child pornography may be predators. *Id.* at 253. The Court held that "[t]he Government has shown no more than a remote connection between speech that might encourage thoughts or impulses and any resulting child abuse. Without a significantly stronger, more direct connection, the Government may not prohibit speech on the ground that it may encourage pedophiles to engage in illegal conduct." *Id.* at 253-54.

¶ 79 As in *Ashcroft*, no more than a remote connection has been shown here. The connection identified by the Utah Legislature is that the viewing of nudity leads to the perpetration of sex offenses, and thus a tax on nudity (and the incorporated expression of nude dancing) is justified to raise funds for sex offender treatment. The legislature failed to identify any evidence of cause and effect.

¶ 80 By anecdote and assumption, the legislature concluded that perhaps one-half of sex offenders may patronize sexually explicit businesses and escort services.[1] This remote connection causes

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[1] Although I recognize that "[t]he First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, . . . whatever evidence the city relies

(Continued on following page)

the Tax to fall within the suspected primary effect of a tax on the form of expression, rather than on any impact to the immediate locale of the taxed businesses. Aside from absence of any evidence of cause and effect, even if we were to assume that there are individuals who would attend a nude dancing performance and would commit a sex crime because of

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upon [must be] *reasonably* believed to be relevant to the problem. . . ." *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51-52 (1986) (emphasis added). It also requires something more than "shoddy data or reasoning" to "fairly support the [government's] rationale for its ordinance." *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 438 (2002) (plurality opinion). That is not the case here. *See, e.g.*, Senate Floor Debate, H.B. 239, 55th Utah Leg., Gen. Sess. (March 2, 2004) (statement of Sen. Howard Stephenson) (explaining that from his understanding, "While most individuals who use sexually oriented businesses do not commit sex crimes, much, like most people who smoke don't get lung cancer, . . . there is a link between smoking and lung cancer for those who do and there is also a link in this for some."); Hearing on H.B. 239 Before the H. Revenue & Taxation Standing Comm. (Feb. 19, 2004) (statement of Att'y Gen. Mark Shurtleff) (recounting his office's experiences with the Internet Crimes Against Children Task Force that an individual traveled from Pennsylvania to Utah to "try and have sex with a 13 year-old girl," and the individual had admitted "to a lifetime full of [being an] Internet predator using chat rooms, hurting children, attending peep shows, [and] going to Pennsylvania [for] these other types [of] sexually explicit and oriented businesses"); Hearing on H.B. 230 Before the H. Revenue & Taxation Standing Comm. (Feb. 3, 2004) (statement of Kathy Ockey) ("I can give you anecdotal information based on my experience [with the Department of Corrections], but not statistics, and my experience is I would guess about half of the sex offenders I have dealt with over the last 18 years [are patrons of the escort services]").

what they viewed, under *Ashcroft* those crimes would constitute a *primary* effect, not a secondary one. Because of this remote connection and lack of secondary effects, "the lesser scrutiny . . . has no application to the content-based regulations targeting the primary effects of protected speech." *Playboy Entm't,* 529 U.S. at 815. Thus the Tax must be evaluated under strict scrutiny.

III. THE TAX FAILS STRICT SCRUTINY

¶ 81 "[A] tax will trigger heightened scrutiny under the First Amendment if it discriminates on the basis of the content of taxpayer speech [or expression]." *Leathers v. Medlock*, 499 U.S. 439, 447 (1991). Content-based regulations are presumptively invalid and subject to strict scrutiny. *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 434 (2002). And "[i]t is rare that a regulation restricting speech because of its content will ever be permissible." *United States v. Playboy Entm't Group*, 529 U.S. 803, 818 (2000).

¶ 82 Under strict scrutiny, the "State must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end." *Ark. Writers' Project, Inc. v. Ragland,* 481 U.S. 221, 231 (1987). Moreover, "[i]t is of no moment that the statute does not impose a complete prohibition. The distinction between laws burdening and laws banning speech is but a matter of degree. The Government's content-based burdens

must satisfy the same rigorous scrutiny as its content-based bans." *Playboy Entm't,* 529 U.S. at 812. This holds especially true where "[a] power to tax differentially, as opposed to a power to tax generally, gives a government a powerful weapon against the taxpayer selected." *Ark. Writers' Project,* 481 U.S. at 228 (quoting *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue,* 460 U.S. 575, 585 (1983)).

¶ 83 The Tax fails strict scrutiny. While the State has an interest in raising revenue to fund the treatment of sex offenders, it is not in the category of government interest so compelling as to burden constitutionally protected rights. Even if it were, the Commission has failed to demonstrate any factual or empirical connection between the expressive activity taxed and the need for sex offender treatment.

¶ 84 Further, even if a compelling interest existed, the statute is not narrowly tailored to achieve that interest. As noted above, the legislature failed to identify any cause and effect between sex offenders and nude performances. For example, the legislature heard the testimony of Kathy Ockey of the Department of Corrections regarding a study by Hanson and Brussiere, which demonstrated that having a paraphilia was the third top indicator of being a sex offender. A paraphilia was defined as an unusual, obsessive sexual interest, such as women's shoes or feathers. The legislature did not choose to tax women's shoes or feathers to provide funding for sex offenders. The only other testimony offered was an anecdotal report, unsupported by data, that perhaps

50 percent of sex offenders may frequent sexually explicit businesses and escort services. However, sex offenders may also frequent restaurants, hair dressers, amusement parks, tennis clubs, and gasoline stations. Attendance or use of these services does not cause individuals to become sex offenders, and no evidence was provided that attendance or use of sexually explicit businesses and escort services cause individuals to become sex offenders. In short, the legislature failed to identify any cause and effect between sex offenders and nude dancing; without doing so, it cannot narrowly tailor its regulation.

¶ 85 Raising money for sex offender treatment is a worthy goal. Nonetheless, the legislature cannot unconstitutionally tax protected speech to obtain the money. The State has not demonstrated it has a compelling reason to tax this speech. Even if it had a compelling interest, the Tax is not narrowly tailored to achieve the interest. Therefore, the Tax is an unconstitutional burden on First Amendment protections.[2]

CONCLUSION

¶ 86 The Tax by its own terms is a content-based tax. It is not a tax of general applicability. It is

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[2] Because the Tax on sexually explicit businesses is unconstitutional under the First Amendment, I would not address the Plaintiffs' argument that the statute is unconstitutional under the Fourteenth Amendment or that the statute is overbroad.

not a tax motivated and justified by secondary effects. The majority's resort to *Erie* does not convince me otherwise. Because the Tax is content based, I would subject it to strict scrutiny and consequently hold that it is unconstitutional under the First Amendment to the United States Constitution.

SUSAN L. BARNUM (5444)
Assistant Attorney General
JAYSEN R. OLDROYD (9901)
Assistant Attorney General
MARK L. SHURTLEFF (4666)
Utah Attorney General
Attorneys for Defendants
160 East 300 South, Fifth Floor
P.O. Box 140874
Salt Lake City, Utah 84114-0874
Telephone (801) 366-0375

IN THE THIRD DISTRICT COURT
FOR SALT LAKE COUNTY
SALT LAKE DEPARTMENT, STATE OF UTAH

BUSHCO, d.b.a. Babydolls Escorts, VALLEY RECREATION, Inc. d.b.a. Kitty's Escort and Angel's Escort, THE D. HOUSE, LLC d.b.a. The Doll House Plaintiffs, AMERICAN BUSH, INC. and DENALI, LLC, d.b.a. SOUTHERN EXPOSURE, Plaintiffs in Intervention, v. UTAH STATE TAX COMMISSION and PAM HENDRICKSON, R. BRUCE JOHNSON, PALMER DEPAULIS, and MARK B. JOHNSON, in their official capacities, as members of the Utah State Tax Commission Defendants.	FINAL JUDGMENT AND ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT (Filed Jul. 3, 2007) Civil No. 040911691 Judge Medley

On June 4, 2007, before the Honorable Tyrone Medley, Plaintiffs' and Defendants' cross motions for summary judgment came before this court for oral argument. Andrew McCullough appeared on behalf of Plaintiffs and Susan L. Barnum and Jaysen R. Oldroyd, Assistant Utah Attorneys General, appeared on behalf of Defendants.

The Court heard oral argument on both Motions, considered the written Memoranda filed by both parties, reviewed the file, and made an oral ruling on the record on June 5, 2007; based thereon the Court now makes the following conclusions of law, based on the undisputed material facts.

1. The escort service Plaintiffs are entitled to First Amendment protection because they incorporate dancing services; thus for purposes of these cross-motions all the Plaintiffs will be treated as if they are entitled to the same First Amendment protection.

2. The sexually explicit business tax set forth in Utah Code Ann. § 59-27-101 et. seq. is content-neutral for First Amendment purposes because it falls on any business involving nudity in its services.

3. The sexually explicit business tax and the escort service tax are content-neutral, and the text for content-neutral laws that impact expressive conduct such as nude dancing set forth in *O'Brien v. United States*, 391 U.S. 367 (1968) applies. The statute meets the four *O'Brien* prongs as follows:

a. First, the legislature has the power to enact this law. The state can impose taxes and this prong is not in dispute.

b. Second, the law furthers a substantial government interest. As stated in the statute, the purpose of the tax is to raise revenue for sex offender treatment. The Legislature heard evidence that there is insufficient funding for sex offender treatment and sex offender recidivism rates are high without treatment and these reasons constitute a substantial government interest.

c. Third, the tax and statute is unrelated to the suppression of the expression that may be affected because seeking additional sex offender treatment funding is unrelated to the suppression of expression. Based on the evidence before the legislature the tax is designed to address negative secondary effects.

d. Fourth, the impact of the statute is not greater than necessary to achieve the desired result because the impact is de minimis; the restriction is not a complete restriction on nude dancing but only a 10% tax on conduct involving nudity, and so is no greater than necessary.

4. The tax on sexually explicit businesses and escort services does not violate the First Amendment.

5. The tax on sexually explicit businesses and escort services also does not violate the equal protection clause of the Fourteenth Amendment because it does not affect fundamental rights, and the

statute has a rational basis, which serves a substantial and legitimate government purpose of crime prevention by funding sex offender treatment.

6. Based on these conclusions, Defendants' Motion for Summary Judgment is granted and Plaintiffs' Motion for Summary Judgment is denied.

7. Judgment is hereby entered in favor of Defendants.

DATED this 3 day of July, 2007.

BY THE COURT:

/s/ Tyrone Medley
Tyrone Medley
Third District Court Judge

[SEAL]

Approved as to Form:

/s/ W. Andrew McCullough
Andrew McCullough
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of June, 2007, I caused to be served by U.S. mail, postage prepaid, a true and correct copy of the foregoing FINAL JUDGMENT AND ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT to the following:

W ANDREW MCCULLOUGH
MCCULLOUGH & ASSOCIATES LLC
6885 SOUTH STATE STREET SUITE 200
MIDVALE UT 84047

By Interoffice Mail to:

UTAH STATE TAX COMMISSION
210 NORTH 1950 WEST
SALT LAKE CITY UT 84134

/s/ Diane Sandberg

IN THE UTAH SUPREME COURT

– – – ooOoo – – –

Bushco, dba Babydolls Escorts, Valley Recreation, Inc. dba Kitty's Escorts and Angel's Escorts, The D. House, LLC dba The Doll House,

Plaintiffs and Appellants,

v.

Utah State Tax Commission and Pam Hendrickson, R. Bruce Johnson, Palmer Depaulis, and Mark B. Johnson, int their official capacities, as members of the Utah State Tax Commission,

Defendants and Appellees.

Case No. 20070559-SC

– – –

ORDER

(Filed Feb. 2, 2010)

This matter is before the court upon the Appellant's Petition for Rehearing filed on December 30, 2009 and the State's Petition for Rehearing, filed on January 4, 2010.

IT IS HEREBY ORDERED that pursuant to Rule 35 of the Utah Rules of Appellate Procedure the Petitions for Rehearing are denied.

For The Court:

2-2-10
Date

/s/ Matthew B. Durrant
Matthew B. Durrant
Associate Chief Justice

Utah Code Ann.

59-27-101. Title.

This chapter is known as the "Sexually Explicit Business and Escort Service Tax."

59-27-102. Definitions.

(1) "Escort" means any individual who is available to the public for the purpose of accompanying another individual for:

(a) companionship; and

(b)(i) a salary;

(ii) a fee;

(iii) a commission;

(iv) hire;

(v) profit; or

(vi) any amount similar to an amount listed in this Subsection (1)(b).

(2) "Escort service" means any person who furnishes or arranges for an escort to accompany another individual for:

(a) companionship; and

(b) (i) a salary;

(ii) a fee;

(iii) a commission;

(iv) hire;

(v) profit; or

(vi) any amount similar to an amount listed in this Subsection (2)(b).

(3) "Nude or partially denuded individual" means an individual with any of the following less than completely and opaquely covered:

(a) genitals;

(b) the pubic region; or

(c) a female breast below a point immediately above the top of the areola.

(4) "Sexually explicit business" means a business at which any nude or partially denuded individual, regardless of whether the nude or partially denuded individual is an employee of the sexually explicit business or an independent contractor, performs any service:

(a) personally on the premises of the sexually explicit business;

(b) during at least 30 consecutive or nonconsecutive days within a calendar year; and

(c) for:

(i) a salary;

(ii) a fee;

(iii) a commission;

(iv) hire;

(v) profit; or

(vi) any amount similar to an amount listed in this Subsection (4)(c).

59-27-103. Tax imposed on a sexually explicit business – Tax imposed on an escort service.

(1) A tax is imposed on a sexually explicit business equal to 10% of amounts paid to or charged by the sexually explicit business for the following transactions:

(a) an admission fee;

(b) a user fee;

(c) a retail sale of tangible personal property made within the state;

(d) a sale of:

(i) food and food ingredients as defined in Section **59-12-102**; or

(ii) prepared food as defined in Section **59-12-102**;

(e) a sale of a beverage; and

(f) any service.

(2)(a) Except as provided in Subsection (2)(b), a tax is imposed on an escort service equal to 10% of amounts paid or charged by the escort service for any

transaction that involves providing an escort to another individual.

(b) Notwithstanding Subsection (2)(a), the tax imposed by Subsection (2)(a) does not apply to a transaction that is subject to the tax imposed in Subsection (1).

(3) The tax imposed by this section:

(a) may not be imposed on any sales and use tax collected or paid under Chapter 12, Sales and Use Tax Act; and

(b) is subject to an agreement sales and use tax under Chapter 12, Sales and Use Tax Act.

(4) The commission shall administer this chapter in accordance with Chapter 12, Part 1, Tax Collection.

59-27-104. Payment of tax.

(1) Subject to Subsection (2), a sexually explicit business or escort service subject to the tax imposed by this chapter shall file a return with the commission and pay the tax calculated on the return to the commission:

(a) quarterly on or before the last day of the month immediately following the last day of the previous calendar quarter if:

(i) the sexually explicit business or escort service is required to file a quarterly sales and use tax return with the commission under Section **59-12-107**; or

(ii) the sexually explicit business or escort service is not required to file a sales and use tax return with the commission under Chapter 12, Sales and Use Tax Act; or

(b) monthly on or before the last day of the month immediately following the last day of the previous calendar month if the sexually explicit business is required to file a monthly sales and use tax return with the commission under Section **59-12-108**.

(2) In accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act, the commission may make rules to:

(a) establish standards for determining whether an operation is a sexually explicit business or escort service; and

(b) determine, for purposes of Section **59-27-102**, amounts that are similar to an amount paid for:

(i) a salary;

(ii) a fee;

(iii) a commission;

(iv) hire; or

(v) profit.

59-27-105. Sexually explicit business and escort service fund.

(1) There is created a restricted special revenue fund called the "Sexually Explicit Business and Escort Service Fund."

(2)(a) Except as provided in Subsection (3), the fund consists of all amounts collected by the commission under this chapter.

(b)(i) The monies in the fund shall be invested by the state treasurer pursuant to Title 51, Chapter 7, State Money Management Act.

(ii) All interest or other earnings derived from the fund monies shall be deposited in the fund.

(3) Notwithstanding any other provisions of this chapter, the commission may retain an amount of tax collected under this chapter of not to exceed the lesser of:

(a) 1.5%; or

(b) an amount equal to the cost to the commission of administering this chapter.

(4)(a) Fund monies shall be used as provided in this Subsection (4).

(b) The Department of Corrections shall use 60% of the monies in the fund, in addition to existing budgets, to provide treatment services to nonworking or indigent adults who:

(i) have been convicted of an offense under Title 76, Chapter 5, Part 4, Sexual Offenses; and

(ii) are not currently confined or incarcerated in a jail or prison.

(c) The Adult Probation and Parole section of the Department of Corrections shall use 15% of the monies in the fund to provide outpatient treatment services to individuals who:

(i) have been convicted of an offense under Title 76, Chapter 5, Part 4, Sexual Offenses; and

(ii) are not currently confined or incarcerated in a jail or prison.

(d) The Department of Corrections shall use 10% of the monies in the fund, in addition to existing budgets, to implement treatment programs for juveniles who have been convicted of an offense under Title 76, Chapter 5, Part 4, Sexual Offenses.

(e) The attorney general shall use 15% of the monies in the fund to provide funding for any task force:

(i) administered through the Office of the Attorney General; and

(ii) that investigates and prosecutes individuals who use the Internet to commit crimes against children.

59-27-106. Records.

(1) An owner or operator of a sexually explicit business or escort service shall maintain records, statements, books, or accounts necessary to determine the amount of tax for which the owner or operator is liable to pay under this chapter.

(2) The commission may require an owner or operator of a sexually explicit business or escort service, by notice served on the person, to make or keep the records, statements, books, or accounts described in Subsection (1) in a manner in which the commission considers sufficient to show the amount of tax for which the owner or operator is liable to pay under this chapter.

(3) After notice by the commission, the owner or operator of a sexually explicit business or escort service shall open the records, statements, books, or accounts specified in this section for examination by the commission or an authorized agent of the commission.

* * *

59-27-108. Penalties and interest.

An owner or operator of a sexually explicit business or escort service that fails to comply with this chapter is subject to:

(1) penalties provided in Section **59-1-401**; and

(2) interest provided in Section **59-1-402**.

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(2)

No. 09-1442

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

In The
Supreme Court of the United States

DENALI, L.L.C. and AMERICAN BUSH, INC.,

Petitioners,

v.

UTAH STATE TAX COMMISSION and PAM HENDRICKSON, R. BRUCE JOHNSON, D'ARCY DIXON PIGNANELLI, and MARC B. JOHNSON, in their official capacities as members of the Utah State Tax Commission,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Utah

BRIEF IN OPPOSITION

MARK L. SHURTLEFF
Utah Attorney General
NANCY L. KEMP*
Assistant Utah Attorney General
Attorneys for Respondents
160 East 300 South, 5th Floor
P.O. Box 140858
Salt Lake City, Utah 84114-0858
(801) 366-0533
nkemp@utah.gov

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

COUNTERSTATEMENT OF QUESTION PRESENTED

The Utah Supreme Court determined that Utah's tax on sexually explicit businesses "is constitutional as a content-neutral regulation of conduct that satisfies the *O'Brien* incidental burdens test." Pet. App. 43. While petitioners purport to ask whether the tax is, in fact, content-based, the body of the petition does not attack the basis of the court's content-neutrality determination. Instead, it proceeds, without analysis, from the premise that the tax is content-based. Consequently, the question before this Court is:

Is a grant of certiorari warranted where petitioner has not challenged the actual basis for the Utah Supreme Court's decision that the Utah tax on sexually explicit businesses is constitutional under the First Amendment?

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INTRODUCTION

Respondents, the Utah State Tax Commission and tax commissioners, file this brief in opposition to the Petition for a Writ of Certiorari to review the decision of the Utah Supreme Court in *Bushco v. Utah State Tax Commission*, 2009 UT 73, 225 P.3d 153. That opinion affirmed the unreported 2007 Final Judgment and Order of the Utah Third District Court. Both are reprinted in Petitioner's Appendix ("Pet. App.").

STATEMENT OF THE CASE

In 2004, the Utah legislature enacted a statute implementing a tax to address problems caused by the commission of sex offenses and the high rate of recidivism among sex offenders. *See* Pet. App. 2, ¶ 1. The proceeds of the tax are directed to a special revenue fund. After deducting the cost of administering the tax (not to exceed 1.5 percent of the fund), 85 percent of the fund is designated for sex offender treatment and 15 percent for investigation and prosecution of individuals who use the Internet to victimize children. Utah Code Ann. § 59-27-105; Pet. App. 69-71. The statute is reprinted in relevant part at Pet. App. 65-72.

Before the tax became effective, certain entertainment businesses featuring semi-nude dancing brought suit to enjoin its enforcement, claiming infringement of their First and Fourteenth Amendment rights.

After the third amended complaint was filed, Denali, L.L.C. and American Bush, Inc., the present petitioners, were permitted to appear as plaintiffs/intervenors. Denali operates an entertainment business licensed by Salt Lake City under its sexually oriented business ordinance and features nude dancing. American Bush operates a semi-nude dancing venue in South Salt Lake City and, under a city ordinance passed in 2001, must comply with a minimal dress code; its compliance exempts it from the tax. The South Salt Lake City ordinance has been upheld against both state and federal constitutional challenges in *American Bush v. City of South Salt Lake*, 2006 UT 40, 140 P.3d 1235, and *Heideman v. South Salt Lake City*, 165 Fed. Appx. 627, 2006 WL 245160 (10th Cir. 2006).

The state district court ruled that the tax is content-neutral "because it falls on any business involving nudity in its services." Pet. App. 59. Because the statute's provisions "impact expressive conduct such as nude dancing[,]" *id.*, the district court applied the four-factor test set forth in *United States v. O'Brien*, 391 U.S. 367 (1968), and concluded that each factor of the test was met. On appeal, the Utah Supreme Court agreed that the tax is content-neutral because it is triggered solely by conduct and was not enacted with the predominant purpose of suppressing protected expression. Like the district court, the supreme court applied *O'Brien* and concluded that the tax met all four factors. Pet. App. 19-37. In addition, the supreme court held that the tax is

not unconstitutionally overbroad because it does not prohibit a substantial amount of protected expression.[1] Pet. App. 37-40.

REASONS FOR DENYING THE PETITION

I. There is No Split of Authority on Content-Neutral Taxation of Businesses Where Nude or Semi-Nude Individuals Provide Services

The basis of the Utah Supreme Court's decision is that the tax is content-neutral and must therefore be evaluated under *O'Brien*'s four-part test. The court was careful to distinguish between "the *O'Brien* test for a regulation of conduct that imposes incidental burdens on some protected expression and the test for a regulation of speech that targets secondary effects." Pet. App. 20. As the court observed, "they are two distinct tests directed at two different inquiries." *Id.* The court rejected the secondary effects analysis because it implicates regulations that are "directed at *speech* rather than conduct, but [are] justified with reference to the secondary effects associated with the speech rather than the communicative content of the speech itself." *Id.* at 21. The Utah tax, by contrast,

[1] The supreme court did, however, overturn the tax as applied to escort services on vagueness grounds because "[n]owhere does the statute define an escort in terms of nudity." Pet. App. 42, ¶ 56. The Tax Commission's petition for rehearing on that issue was denied.

"is triggered by nudity, which the Supreme Court has specifically declared 'is not an inherently expressive condition.'" *Id.* at 12 (citing *City of Erie v. Pap's A.M.*, 529 U.S. 277, 289 (2000)). Finding the tax "indistinguishable from the public nudity ordinance upheld in *Erie*[,]" the court further noted that "[a]lso like the *Erie* ordinance, the Tax applies or does not apply without reference to either protected expression or any particular message." *Id.* at 13.

While petitioners initially purport to challenge the court's conclusion that the tax is content-neutral, Pet. at i, the petition does not examine the court's analysis, but builds its argument on the presupposition that the statute is content-based – a premise the Utah court rejected. Petitioners then attempt to show a split of authority by citing cases and proposed legislation addressing content-based schemes. Petitioners' citations are inapposite to establishing a split of authority on the constitutionality of content-neutral statutes that may incidentally burden protected expression.

Petitioners' reliance on a list of legislative proposals to tax sexually oriented businesses – taken verbatim from the petition for writ of certiorari filed in *Pooh Bah Enterprises v. County of Cook*, 2009 WL 2187815 at *22 n.10, *cert. denied*, 130 S. Ct. 258 (2009) – is misplaced. *See* Petition at 14 n.2. Petitioners have made no effort to show that the cited proposals contain language similar to the Utah statute. Nor is there a showing that any of the proposals has been enacted into law or subject to judicial scrutiny.

These inchoate legislative efforts do nothing to establish a split of authority. Moreover, to the extent that they represent a variety of approaches to addressing problems related to such businesses, permitting lower courts to review the constitutionality of enacted legislation before intervention by this Court promotes the development of the law and thorough consideration of all constitutional ramifications. Short-circuiting this process leaves the Court with a less-informed basis for decisionmaking.

Petitioners' failure to recognize the court's distinction between content-based statutes and the content-neutral provision at issue here is further reflected in the petition's unattributed use, without significant alteration, of an argument from the recent, unsuccessful certiorari petition in *Pooh Bah*. *Compare* 2009 WL 2187815 at *22-24, *with* Petition at 14-16. The argument is inapposite to the present case because it addresses only "content-based tax schemes." Petition at 14; 2009 WL 2187815 at *22. The city and county taxes at issue in *Pooh Bah* were unquestionably content-based, involving a combined 11-percent tax on "'amusements[,]'" including "'performances conducted at adult entertainment cabarets'" but explicitly exempting live performances "'in any of the disciplines which are commonly regarded as part of the fine arts, such as live theater, music, opera, drama, comedy, ballet, modern or traditional dance, and book or poetry readings.'" *Pooh Bah Enters. v. County of Cook*, 232 Ill.2d 463, 467-68, 328 Ill. Dec. 892, 896-97, 905 N.E.2d 781, 785-86 (2009)

(quoting Cook County Amusement Tax Ordinance § 2 (1999); Chicago Municipal Code § 4-156-010 (2008)). The county's zoning ordinance defined "adult entertainment cabaret" in terms of content, as establishments featuring "'topless dancers, strippers, male or female impersonators or other entertainers who[,]'" while displaying "'"'specified anatomical areas[,]' B. [p]erform in a manner which is designed primarily to appeal to the prurient interest of a patron or person; or C. [e]ngage in, or engage in simulation of, 'specified sexual activities.'"" 905 N.E.2d at 786 (quoting Cook County Zoning Ordinance of 2001, art. 14.2.1 (2006)). The city ordinance contained similar definitions. *Id.*

In contrast, nothing in the language of the Utah statute differentiates between services performed by nude or partially nude individuals in fine arts venues and those performed in adult entertainment venues. Nor does the statute distinguish nudity targeting patrons' prurient interests or simulating sexual activities from nudity expressing other values. The Utah tax applies, by its own terms, to any "business at which any nude or partially denuded individual, regardless of whether the nude or partially denuded individual is an employee of the sexually explicit business or an independent contractor, performs any" compensated service on the business premises during at least 30 days within a calendar year. Utah Code Ann. § 59-27-102(4) (West 2008), Pet. App. 66.

The argument of amicus curiae Association of Club Executives, Inc. (ACE) is equally unavailing. ACE urges the Court to grant certiorari in order to

establish the unconstitutionality of the Nevada Live Entertainment Tax. Like the tax in *Pooh Bah Enterprises* – but unlike the Utah tax – the Nevada Live Entertainment Tax is content-based. While broadly defining "live entertainment," the Nevada statute provides a number of categorical exemptions from the tax, including entertainment in small venues; at trade shows; at boxing events; by wandering musicians; in common areas of shopping malls; at food demonstrations or craft shows; at retail grocery, hardware, or houseware outlets; at outdoor concerts; at minor league baseball games; and at NASCAR events. *See* Nev. Rev. Stat. 368A.200, Amicus App. 30-32; *see also* Amicus Brief at 8-10. No such categorical exemptions appear in the Utah tax. Moreover, as ACE points out, "even the *amount* of the tax is not consistently assessed" under the Nevada statute. Amicus Brief at 10. The Utah tax, by contrast, applies consistently across all venues. Finally, the Nevada tax raises an issue that is entirely absent from the Utah statute: it contains a prohibition on any legal action against the state to prevent or enjoin collection of the tax, a provision it notes as common practice in state tax statutes. *See* Amicus Brief at 11. A grant of certiorari in this case will provide no opportunity for the Court to reach that issue.

Because both petitioners and amicus fail to grasp the distinction between content-based and content-neutral statutes, their arguments rely on showing error in the application of a "secondary effects" rationale. *See* Petition at 12-19; Amicus Brief at 20-26.

These arguments are fruitless because the Utah court did not decide the case based on the secondary effects doctrine. Consequently, there is no merit to amicus's contention that the Utah decision "will establish a dangerous precedent that will be used across the country to radically expand the secondary effects doctrine far beyond the current constitutional restraints and parameters set by this Court, permitting the unbridled enactment of virtually any tax on protected expression." Amicus Brief at 26. No decision of this Court is needed to correct a rationale the Utah court did not employ.

II. The Utah Court Did Not Err in Applying *O'Brien*'s "Incidental Burdens" Test

For the same reason that the petition does not show a split of authority – an incorrect presupposition that the statute is content-based – it fails to demonstrate an erroneous application of *O'Brien*'s "incidental burdens" test. At no point does the petition address the language of Utah's statute. Given petitioners' presupposition that the statute is content-based, it is unsurprising that the petition makes no reference to the statutory language, as nothing in the statute refers in any way to content. *See* Pet. App. 65-72. Scrutiny of the statute reveals that the tax is applied only on the basis of services performed in a state of nudity or partial nudity. Because "[b]eing 'in a state of nudity' is not an inherently expressive condition" entitled to First Amendment protection, the statute, contrary to petitioners' representations,

is not content-based, as the Utah court correctly determined. *City of Erie v. Pap's A.M.*, 529 U.S. 277, 289 (2000).

The actual basis for the Utah court's decision is sound under this Court's precedents. As the Utah court correctly recognized, because the statute is content-neutral, it must be evaluated under *O'Brien*'s four-part test: (1) whether the tax is within the Utah legislature's power to enact; (2) whether it furthers a substantial state interest; (3) whether that interest is unrelated to the suppression of protected expression; and (4) whether it is narrowly tailored to serve the state interest. The court found each factor of the test satisfied. Rather than taking issue with the court's analysis, petitioners conflate the *O'Brien* and secondary effects analyses, declaring that "[t]he link between the regulation and 'secondary effects' in the *Renton* line of cases is exactly the same as the link that is required under *O'Brien*." Petition at 23. In support of this approach, they cite to Part III of the *Erie* opinion, which they erroneously identify as written by Justice O'Connor "for the majority (on this point)." *Id.* at 24. In fact, Part III was written for a four-justice plurality. Moreover, the plurality opinion did not, as petitioners claim, fail to differentiate between the two tests. Recognizing that "the doctrinal theories behind 'incidental burdens' and 'secondary effects' are, of course, not identical," 529 U.S. at 295, the plurality concluded that

> there is nothing objectionable about a city passing a general ordinance to ban public

> nudity (even though such a ban may place incidental burdens on some protected speech) and at the same time recognizing that one specific occurrence of public nudity – nude erotic dancing – is particularly problematic because it produces harmful secondary effects.

Id. Far from conflating the analyses as petitioners have done, the *Erie* plurality discerned that even if the city considered nude dancing to be "a particularly problematic instance of public nudity, the regulation is still properly evaluated as a content-neutral restriction because the interest in combating the secondary effects associated with those clubs is unrelated to the suppression of the erotic message conveyed by nude dancing." *Id.* at 296. Applying *O'Brien*, the plurality upheld the Erie ordinance as a content-neutral provision placing only an incidental burden on protected expression: "The ordinance regulates conduct, and any incidental impact on the expressive element of nude dancing is *de minimis*." *Id.* at 301. *Erie* provides no support for petitioners' position.

While petitioners claim that the intermediate scrutiny of *O'Brien* requires a showing of "some clear relationship between this tax and *proven harms*; and that the measure deals with such harms to a *material degree*[,]" Petition at 22, they provide no supporting authority for such requirements. The Utah court concluded those arguments "are misplaced because they are based on the requirements of the secondary

effects test rather than the *O'Brien* test." Pet. App. 24, ¶ 32. The court pointed to the distinction made by the plurality in *Erie* between content-based and content-neutral restrictions and the greater latitude permissible in restricting expressive conduct where that conduct is not targeted. *See* Pet. App. 25 at ¶ 32 n.53. Nothing in petitioners' argument acknowledges this distinction, much less shows error in the Utah court's application of it.

Moreover, to the extent that a link is required between the State's conceded need to fund sex offender therapy and the means chosen to accomplish that interest, *O'Brien*'s "narrow tailoring" prong provides it. "[T]he requirement of narrow tailoring is satisfied 'so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.'" *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989) (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985)) (alteration in original). Here, the State's interest in funding sex offender therapy would be less effectively achieved without the money derived from the tax.

Petitioners provide no basis for distinguishing the Utah statute from the ordinance upheld under *O'Brien* in *Erie*. They concede that "the State has the power to tax and raise revenue." Petition at 21. They also concede that "[t]he need for therapy for those who have been convicted of sexual offenses is not in controversy." *Id.* Because the statute is content-neutral, as discussed in Point I, above, it "also satisfies *O'Brien*'s third factor, that the government

interest is unrelated to the suppression of free expression." *Erie*, 529 U.S. at 301. Avoiding liability under the statute, as under the Erie ordinance, necessitates only compliance with minimal dress requirements. And even if, as in *Erie*, those requirements may not be as effective as other means of addressing any problems associated with a specific occurrence of public nudity, the State, like the City of Erie, "must balance its efforts to address the problem with the requirement that the restriction be no greater than necessary to further" its interest. *Id.* Finally, as in *Erie*, "the restriction leaves ample capacity to convey the dancer's erotic message." *Id.* The Utah court properly applied *O'Brien* and *Erie* in concluding that the Utah statute passes First Amendment scrutiny, and petitioners have failed to cast its ruling in doubt.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

MARK L. SHURTLEFF
Utah Attorney General
NANCY L. KEMP*
Assistant Utah Attorney General
Attorneys for Respondents

**Counsel of Record*

September 2010

JUN 28 2010

No. 09-1442

In The
Supreme Court of the United States

DENALI, L.L.C. and AMERICAN BUSH, INC.,

Petitioners,

v.

UTAH STATE TAX COMMISSION, et al.,

Respondents

On Petition For A Writ Of Certiorari To The Utah Supreme Court

BRIEF OF *AMICUS CURIAE* ASSOCIATION OF CLUB EXECUTIVES, INC., IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

BRADLEY J. SHAFER
(Counsel of Record)
ANDREA E. PRITZLAFF
SHAFER & ASSOCIATES, P.C.
3800 Capital City Boulevard,
Suite 2
Lansing, Michigan 48906
Telephone: (517) 886-6560
Facsimile: (517) 886-6565
shafersociates@acd.net

Counsel for Amicus Curiae Association of Club Executives, Inc.

June 28, 2010

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

MOTION FOR LEAVE TO FILE A BRIEF OF *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

Amicus Curiae Association of Club Executives, Inc. ("ACE," or "ACE National"), hereby respectfully moves for leave to file the attached brief *Amicus Curiae* in this case. The consent of the attorney for Petitioners has been obtained; the consent of the attorney for Respondents was requested but has not been obtained.

ACE is a Florida "501(c)(6)" non-profit corporation that is the national trade association for the exotic dance nightclub industry. Among other things, ACE assists in the forming of affiliate state chapters. ACE National and its affiliated state chapters have been established, in part, to protect adult cabaret nightclubs from legislation meant to suppress this form of entertainment.

The membership of ACE National is comprised of approximately 1,492 exotic dance clubs, including Deja Vu Showgirls of Las Vegas, LLC (d/b/a Deja Vu Showgirls), Little Darlings of Las Vegas, LLC (d/b/a Little Darlings), SHAC, LLC (d/b/a Sapphire), K-Kel, Inc. (d/b/a Spearmint Rhino Gentlemen's Club), D.I. Food & Beverage of Las Vegas, LLC (d/b/a Scores), and The Power Company, Inc. (d/b/a Crazy Horse Too Gentlemen's Club) (collectively, the "Nevada ACE Clubs"). These particular clubs are plaintiffs in lawsuits challenging a Nevada tax similar to the one

at issue in the case brought by Petitioners Denali, L.L.C., and American Bush, Inc., in Utah.

Amicus ACE seeks to file this brief as a representative for the Nevada ACE Clubs, and on behalf of its other members which are now (or may be in the near future) facing similar types of draconian taxes directed specifically against controversial, unpopular, or disfavored – but nonetheless constitutionally protected – speech and expression. These businesses, their ability to present their desired form of constitutionally protected entertainment, and the public's right to view such expression, may be significantly curtailed unless this Honorable Court grants the Petition in this matter. In addition, ACE's members, and in particular the Nevada ACE Clubs, will be significantly affected by any ruling of this Court in regard to the filed Petition, including the denial thereof which could be taken by the inferior courts around the country, including the Nevada court currently addressing the claims of the Nevada ACE Clubs, as tacit acknowledgement that the new, unique, and potentially dangerous analysis adopted by the Utah Supreme Court is acceptable under First Amendment jurisprudence.

Amicus believes that the Utah State Supreme Court decision in this action will result in significant infringement upon the exercise of protected expression, and should be immediately addressed by this Honorable Court. The analysis utilized therein appears to be in direct contravention to the jurisprudence of this Court involving the constitutionality of

tax laws directed at First Amendment activities, and adopts a watered-down level of constitutional scrutiny (not seen in any other case throughout the country) that will invariably lead to the enactment of other tax laws specifically directed at controversial, unpopular, or disfavored expression, and to, as a consequence thereof, the infringement of First Amendment protected activities.

Wherefore, *Amicus* Association of Club Executives, Inc., respectfully requests that this motion for leave to file the attached brief, *amicus curiae*, be granted.

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae Association of Club Executives, Inc. ("ACE," or "ACE National"), is a Florida "501(c)(6)" non-profit corporation that is the national trade association for the exotic dance nightclub industry. Among other things, ACE assists in the forming of affiliate state chapters. ACE National and its affiliated state chapters have been established, in part, to protect adult cabaret nightclubs from legislation meant to suppress this form of entertainment.

The membership of ACE National is comprised of approximately 1,492 adult cabaret nightclubs, including Deja Vu Showgirls of Las Vegas, LLC (d/b/a Deja Vu Showgirls); Little Darlings of Las Vegas, LLC (d/b/a Little Darlings); SHAC, LLC (d/b/a Sapphire); K-Kel, Inc. (d/b/a Spearmint Rhino Gentlemen's Club); D.I. Food & Beverage of Las Vegas, LLC (d/b/a Scores); and The Power Company, Inc. (d/b/a Crazy Horse Too Gentlemen's Club) (collectively, the "Nevada ACE Clubs"). For the sake of simplicity,

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[1] Pursuant to Sup. Ct. R 37.6, counsel for *Amicus Curiae* declare that they authored this brief in total with no assistance from the parties. Additionally, no individuals or organizations other than the *Amicus* made a monetary contribution to the preparation and submission of this brief. Written consent of Petitioners to the filing of this brief has been filed with the Clerk pursuant to Sup. Ct. R 37.2(a). The parties were notified at least ten days prior to the filing of this brief, that *Amicus Curiae* intended to submit a brief in support of review. Respondents did not give their consent.

these businesses are referred to herein as the "Nevada ACE Clubs."

The Nevada ACE Clubs are plaintiffs in lawsuits challenging a Nevada tax similar to the one at issue in the case brought by Petitioners Denali, L.L.C., and American Bush, Inc., in Utah. ACE is filing this brief as a representative for the Nevada ACE Clubs and on behalf of its other members, which are now – or which may be in the near future – facing similar types of draconian taxes directed specifically against controversial, unpopular, or disfavored, but nonetheless constitutionally protected, speech and expression. These businesses, their ability to present their desired form of constitutionally protected entertainment, and the public's right to view such expression, may be significantly curtailed unless this Honorable Court grants the Petition here.

SUMMARY OF ARGUMENT

Under the Tax Injunction Act, 28 U.S.C. § 1341, and the interpretive jurisprudence regarding that statute by this Honorable Court, it is virtually impossible for a person or business entity faced with a content-based state tax, directly targeting expression protected by the First Amendment, to seek and obtain redress in the federal courts. Rather, this Court has directed that those aggrieved must look to state remedies that may be administratively, or judicially, available, but where challengers may be

subject to state administrators and judges who may be unsympathetic to the federal rights at issue, and who may be subject to political and institutional pressures (from which life-tenured federal judges are insulated)[3] to uphold these types of targeted taxes, to thereby protect the revenue stream of state tax dollars, and to placate the rest of the citizenry whose own taxes would not then have to increase accordingly.

However, the avenues of state redress are uncertain, they are not necessarily – as demonstrated by the experience of the Nevada ACE Clubs – either speedy or expeditious, and they are pitted with procedural hurdles and roadblocks that may make it difficult, if not impossible, to fully and adequately protect the sensitive First Amendment rights at stake.

In fact, some of these state taxation statutes specifically *preclude* the entry by a state court of an injunction or other legal order prohibiting the collection of the tax (as is the case regarding the Nevada ACE Clubs), *even if the court were to find that there was a substantial likelihood that the tax was unconstitutional*. Such a statute basically ensures that no judicial relief is available to preclude First Amendment rights from being irreparably harmed.

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[3] *See, e.g., Kaufman v. United States*, 394 U.S. 217, 225-226 (1969); and *Butler v. McKellar*, 494 U.S. 407, 427 n.8 (1990) (Brennan, J., dissenting).

Because of the jurisdictional impediments to federal courts presented by the Tax Injunction Act, because state remedies are not truly "speedy," because state redress may not be able to preclude the incurrence of irreparable harm to the engagement of First Amendment activities, because these types of targeted taxes are popping up throughout the country as a result of the current economic climate yet appear to directly conflict with the First Amendment jurisprudence of this Honorable Court, and because the Utah Supreme Court has charted out new and dangerous ground in invoking the "secondary effects" doctrine as a way to justify the enactment of tax laws that would otherwise be invalidated under the existing precedent of this Court, *Amicus* asserts that the Petition should be granted.

REASONS FOR GRANTING THE PETITION

As this Court has stated, the power to tax the exercise of a constitutional right "is the power to control or suppress its enjoyment." *Murdock v. Commonwealth of Pennsylvania*, 319 U.S. 105, 112 (1943). With the current economic climate – where virtually every governmental unit is in financial distress – those engaged in controversial, unpopular, or disfavored speech/expression, and who do not then possess the political clout to derail the enactment of abusive legislation, have become easy targets for the imposition of significant, and in some circumstances draconian, taxes directly targeted at such activities.

The taxes at issue in the Petition, and as faced by a number of *Amicus'* members, are just such examples.

In light of the admonition in *Murdock*, it is important to note that, as this Court has recognized on numerous occasions, the infringement of First Amendment rights, even for a minimal period of time, unquestionably constitutes irreparable harm so as to *otherwise* justify the entry of preliminary injunctive relief. *See, e.g., Elrod v. Burns*, 427 U.S. 347, 373 (1976). And, the imposition of the types of taxes at issue here can create such injury. *See, e.g., Joelner v. Village of Washington Park, Illinois*, 378 F.3d 613, 620, 628 (7th Cir. 2004) (court found that if plaintiff could not afford the "hefty" licensing fee required, "he would be forced to shut down his bookstore. Hence, there is a threat that these allegedly unconstitutionally excessive fees could cause Joelner significant irreparable harm").

Yet, as will be discussed below, many state taxation statutes, including the one challenged by the Nevada ACE Clubs, contain provisions that specifically preclude state courts from enjoining the collection of the tax, *even if the taxation provisions are blatantly unconstitutional*. Consequently, a litigant challenging a content-based tax, directly targeted at protected expression, may be unable to obtain timely and effective judicial relief to ensure that the engagement in First Amendment activities is not, in fact, irreparably harmed. It is, therefore, critical that the legislative branches of government and the inferior courts (particularly the *state* courts, where

most of these challenges will occur in light of the preclusive effect of the Tax Injunction Act; 28 U.S.C. § 1341) have clear guidance from this Court as to the standards to apply when evaluating the constitutionality of such taxes so that important First Amendment rights are not further sacrificed. The Petition should be granted.

I. THE TAX INJUNCTION ACT, 28 U.S.C. § 1341, AND STATE PROCEDURAL HURDLES MAKE IT EXTREMELY DIFFICULT, IF NOT IMPOSSIBLE, TO MOUNT A TIMELY AND EFFECTIVE JUDICIAL CHALLENGE TO THESE TYPES OF CONTENT-BASED TAXES; THEREFORE WARRANTING THIS COURT GRANTING THE PETITION IN ORDER TO PROVIDE PROPER AND TIMELY GUIDANCE TO BOTH THE LEGISLATIVE BRANCHES OF GOVERNMENT AND TO THE LOWER COURTS IN EVALUATING THE CONSTITUTIONALITY OF THESE NEW FORMS OF TAXES SPECIFICALLY DIRECTED AGAINST PROTECTED EXPRESSION.

Petitioners brought to this Court's attention the increasing frequency with which taxes upon the presentation of constitutionally protected erotic expression have been imposed throughout the country. Petition, pp. 14-16. The Nevada ACE Clubs are facing just such a content-based tax, and their experience in attempting to challenge that statute demonstrates the need for this Court to grant the Petition and to

provide clear direction as to the constitutionality of these increasingly popular taxes.

A. The Nevada Live Entertainment Tax.

On July 22, 2003, Nevada enacted Chapter 368A of the Revised Statutes, which imposes, subject to numerous and various exceptions discussed below, an excise tax on admission to any facility that provides defined "live entertainment" (hereinafter, "Chapter 368A," or the "Live Entertainment Tax," or simply the "LET"). As originally adopted, the tax imposed by Chapter 368A was not applicable, under the terms of NRS § 368A.200(5)(d), to live entertainment in a non-gaming[3] establishment if the facility in which the live entertainment was provided had a maximum occupancy of less than 300 persons.

On June 17, 2005, however, Chapter 368A was amended to reduce the scope of the NRS § 368A.200(5)(d) exemption from a maximum seating capacity of 300 down to 200. The purpose of this amendment was to specifically extend the LET to a number of adult entertainment nightclubs that were not then subject to the tax.[4] Relevant excerpts of the

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[3] The LET is administered in two different fashions; one for licensed gaming (legalized gambling) establishments, and the other for non-gaming places of business.

[4] The legislative history unequivocally bears this out, by noting one Senator observing that the 2005 amendments to the statute were necessary because the original 2003 Bill "didn't adequately bring in a group some of us intended to be covered,

(Continued on following page)

current codified version of Chapter 368A, incorporating the 2005 amendments, are attached hereto at App. 24-36.

While purporting to apply to virtually any form of live entertainment (*see* NRS 368A.090) (App. 25), the LET is gerrymandered in such a fashion so that the non-gaming aspects of the tax apply to adult nightclubs and little else. Exemptions to the taxes are contained in NRS 368A.200(5) (App. 30-32), and preclude the taxing of, among other things:

- Live entertainment by tax-exempt or non-profit organizations;
- Boxing contests;
- Live entertainment at trade shows;
- Music performed by musicians who move constantly through an audience;

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which are the striptease clubs that have proliferated, particularly in southern Nevada." App. 38. In that same hearing, the Chairwoman commented that the state was getting "the most revenue from adult entertainment clubs, which is $6 million dollars, the highest amount paid under the live entertainment tax." App. 41. While she further stated that "everything else pales in comparison" to how much the "adult entertainment clubs" were bringing in under the LET, she observed that the next highest amount was the "race tracks," that were at $1.5 million. *Id.* However, this legislative history also explains that NASCAR racing and other sporting events were then being *exempted* from the tax because they were believed by the legislators to be "*family oriented*." App 42.

- Live entertainment at private meetings or dinners in licensed gaming establishments;
- Live entertainment provided in the common areas of shopping malls;
- Food and product demonstrations;
- Live entertainment that is incidental to an amusement ride, motion simulator or similar digital, electronic mechanical attraction;
- Live entertainment that is provided to the public in an outdoor area if no admission fee is charged;
- Any outdoor concert (thereby negating the admission fee restriction of the previous exemption);
- NASCAR or associated race events;
- Minor league baseball events; and
- "Incidental" live entertainment provided in a restaurant which only serves as *ambiance*.

Those are not, however, all the exemptions. The definition of "live entertainment" under NRS 368A.090(b) (App. 26-28) excludes:

- Instrumental or vocal music in a restaurant, lounge or similar area that does not interfere with casual conversations;

- Unadvertised occasional performances by employees who prepare, sell or serve food or beverages to patrons;
- Performances at certain licensees gaming establishments where the "performers stroll continuously throughout the facility";
- Performances in licensed gaming establishments "which enhance the theme of the establishment or attract patrons to the areas of the performances, as long as any seating provided in the immediate area of the performers is limited to seating at slot machines or gaming tables";
- Broadcasts of live entertainment;
- Entertainment provided by patrons;
- Animal behaviors for scientific and education research purposes; and
- Occasional, unadvertised, activity (including dancing) that primarily "serves to provide ambience," is conducted by an employee whose primary job function is not that of an entertainer, and "does not constitute a performance."

In addition, even the *amount* of the tax is not consistently assessed. There is a higher rate of tax for establishments with a seating capacity of less than 7,500 persons (*i.e.*, the non-casinos), than for facilities over that number. NRS 368A.200(1) (App. 28-29).

No suit may be filed to recover taxes alleged to have been erroneously or illegally collected unless an administrative claim for refund has been filed. NRS 368A.280(2) (App. 35). In addition, the statute holds that "*[n]o injunction, writ of mandate or other legal or equitable process may issue in any suit, action or proceeding in any court against this state or against any officer of the State to prevent or enjoin the collection under this chapter of the tax imposed by this chapter or any amount of tax, penalty or interest required to be collected.*" NRS 368A.280(1) (App. 34-35) (emphasis added). This Court has noted that these types of judicial redress restrictions are "common practice" in state tax statutes. *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 523 (1981) (quoting S. Rep. No. 1035, 75th Cong., 1st Sess., 1 (1937)).

B. The Nevada Proceedings.

Because the LET is specifically directed at activities protected by the First Amendment and appears to violate all three constitutional precepts as established by this Court for the invalidation of a tax directed at protected expression (*see* Section III, *infra*), the Nevada ACE Clubs filed suit in federal district court in Las Vegas in April of 2006, challenging its constitutionality (the "Federal Case"). The Department of Taxation filed a motion to dismiss, claiming that the Tax Injunction Act (28 U.S.C. § 1341) precluded the lawsuit because the Nevada court and administrative systems provided, in the words of the statute, a "plain, speedy and efficient

remedy" to challenge the LET. The district court granted that motion and dismissed the case (App. 11-19), and the Ninth Circuit affirmed in a three-paragraph ruling made without oral argument. App. 1-2.

As a result of the district court's dismissal of the Federal Case, in December of 2006, the Nevada ACE Clubs filed a similar offensive lawsuit in Nevada state court ("First Nevada State Case"). This suit, like the Federal Case, requested an injunction to prohibit the collection of the tax that plaintiffs there contended was blatantly unconstitutional.[5] In addition, because of the statutory provisions of Chapter 368A, a number of the Nevada ACE Clubs were then required to undertake the state administrative refund process as a predicate for the filing of a *refund suit* in state court.

After filing their first set of administrative requests for refund to the Nevada Department of Taxation ("Department"), all of which were denied, those

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[5] Injunctive relief was requested irrespective of the provisions of NRS 368A.280(1) (which statutorily prohibited any injunction or other court order preventing the collection of the LET), as the Nevada ACE Clubs asserted that such a statutory prohibition was, itself, unconstitutional as a violation of the separation of powers among the branches of government. *See, e.g., City of Norwood v Horney*, 853 N.E.2d 1115, 1122, 1148-1150 (Ohio 2006); and Nevada Const. Art. 6, § 6 (which states. " . . . The District Courts and the Judges thereof have power to issue writs of . . . Injunction . . , and all other writs proper and necessary to the complete exercise of their jurisdiction").

entities appealed to the Nevada Tax Commission ("Commission"), which began hearing the appeals on July 9, 2007. At that initial hearing, the Department, through legal counsel, stated that it was

> important to mention NAC 368A.170 which requires that if it is determined that a refund is appropriate in this case, *that the taxpayer would first have to establish that any amounts of the refund could be or have been actually refunded to the patrons of the taxpayer, and there has been no indication in this case that there is any ability of the taxpayer to refund that money to the patrons.*

Transcript, July 9, 2007, p. 30 (emphasis added). App. 7.

NAC 368A.170 (App. 23-24) concerns the "over-collection" of taxes (defined, in part, as "any amount collected as a tax on live entertainment that is exempt from taxation pursuant to subsection 5 of NRS 368A.200" – NAC 368A.170(1) (App. 23)), and states that any over-collection "must, if possible, be refunded by the taxpayer to the patron from whom it was collected." NAC 368A.170(2) (App. 23). The taxpayer is required to use "all practical methods to determine any amount to be refunded pursuant to subsection 2 and the name and address of the person to whom the refund is to be made." NAC 368A.170(3)(a) (App. 23).

When the hearing was continued on August 6, 2007, counsel for the appellants (the undersigned) addressed the State's NAC 368A.170 argument:

> . . . [W]hat the Department would say is that if a customer buys Coca-Cola, for us to get a refund of this tax, we have to get the name and address of every person buying a Coca-Cola or a beer coming in the facility and I don't think any of you in your real life experiences have ever had any time where you went to buy food and drink and had to give your name and address, and that doesn't happen here.

Transcript, August 6, 2007, p. 10 (App. 4).

The undersigned further informed the Commission that the taxes were paid not by the patrons but, rather, by the clubs themselves, and submitted affidavits from four of the Nevada ACE Clubs establishing that "none of the facilities have raised their admission fees in order to recoup the tax, the tax merely is deducted out of the general receipts of the business and it's the businesses' money that we're trying to get back." Transcript, August 6, 2007, pp. 10-11 (App. 4).

Despite these and other arguments, the Commission upheld the refund request denials. Thereafter, pursuant to NRS 368A.280(2) and 368A.290, those appellants filed suit in state court seeking a judicial determination on their claim for refund (the "Second State Case"). That action was assigned to the same judge handling the First State Case.

On June 5, 2008, the Nevada ACE Clubs, being the plaintiffs in the First State Case, filed a motion for preliminary injunction, which was argued on July

31, 2008. *That motion has yet to be decided by the state trial court.*[6]

These delays are of absolutely no concern to the Nevada government. In their motion to dismiss the Federal Deja Vu Case, the state contended that it was not necessary to afford those plaintiffs *any* judicial redress to either declare the LET unconstitutional, or to enjoin its enforcement, stating: "The foregoing provision [NRS 368A.280(1)] has not yet been construed by the Nevada Supreme Court. Even were it construed to prohibit every remedy other than the refund procedures allowed under NRS 368A.250-.320, *the refund procedures are adequate. There is no requirement that taxpayers be afforded more than that.*" *Motion to Dismiss*, p. 8 (emphasis and clarification added). App. 21. Even in the federal appeal, the State of Nevada took the position that the aggrieved taxpayer was merely entitled to the administrative review process to obtain a tax refund. Appellees' Answering Brief, p. 13 (App. 9-10).

C. These Events Demonstrate why Review by this Court of this Area of First Amendment Jurisprudence is Warranted.

Under the Tax Injunction Act, federal jurisdiction to enjoin an unconstitutional state tax statute – even

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[6] The defendants to that action also filed, at approximately the same time, a motion to dismiss the First State Case, and later a motion for summary judgment. Those motions, also, have yet to be ruled upon by the state trial court.

one directly impacting upon First Amendment rights – does not apply when there is a "plain, speedy and efficient remedy . . . in the courts of that state." 28 U.S.C. § 1341. That state remedy has to be "swift and certain." *Hibbs v. Winn*, 542 U.S. 88, 108 n.10 (2004). The federal district court in Las Vegas and the Ninth Circuit both held that such a "swift and certain" state remedy existed under the laws of Nevada.

Yet, here, the First State Case was filed in December 2006, the administrative process began in February 2007, and a second lawsuit was filed in January 2008 to judicially appeal the Commission's denial of the first set of requests for refund of the taxes paid. To date, however, no resolution has occurred (again, the state trial court has not yet even ruled on the Nevada ACE Clubs' motion for preliminary injunction filed in *June of 2008*), and the Department continues to deny each and every request for refund filed on a monthly basis.

The Nevada ACE Clubs are now approaching the *fourth* anniversary of the filing of the First State Case (and well over four years since the filing of their initial federal court action), and they must continue to pay oppressive taxes that they contend are blatantly unconstitutional under the First Amendment jurisprudence of this Honorable Court. Moreover, even if the clubs prevail in their state court proceedings and the LET is found to be illegal, the Nevada ACE Clubs will be confronted with NAC § 368A.170 (the clubs needing the name and address of every patron who purchased admission, food, drink

or merchandise in order to be able to remit the refund back to them) in their attempts to be reimbursed for the taxes paid, and may be precluded from obtaining tax refunds for the illegally paid taxes *even if the tax is judicially determined to be flagrantly unconstitutional*. The longer it takes for this Court to address these issues, the more potentially unconstitutional taxes are paid that the Nevada ACE Clubs and others may never be able to recoup.

As *Amicus* has described, their state proceedings have not been speedy, they have not been efficient, and any recovery is far from certain even if the Live Entertainment Tax is found to be unconstitutional. As more of these types of taxes are enacted, litigants challenging such laws will face the same types of state procedural hurdles as have confronted the Nevada ACE Clubs. Unless this Court grants the Petition, scores of individuals and businesses engaged in the presentation of First Amendment protected expression will continue to have to pay draconian taxes pursuant to statutory schemes that may well violate the First Amendment, potentially leading to financial ruin and the cessation of the engagement in protected expression.

For these reasons, *Amicus* respectfully requests that the Petition for a Writ of Certiorari be granted so that this Court may provide clear guidance on these critical matters of First Amendment jurisprudence.

II. THE TYPE OF TAXES AT ISSUE HERE ARE NOT SUBJECT TO THE POLITICAL RESTRAINTS, RECOGNIZED BY THIS COURT, WHICH ENSURE THAT UNCONSTITUTIONAL TAXATION LAWS ARE NOT ENACTED; THEREBY WARRANTING PROMPT REVIEW BY THIS HONORABLE COURT.

What is clear in both the Utah and Nevada statutes is that these are not generally applicable, "across-the-board," taxes. As this Court noted in *Minneapolis Star and Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983):

> A power to tax differentially, as opposed to a power to tax generally, gives a government a powerful weapon against the taxpayer selected. *When the State imposes a generally applicable tax, there is little cause for concern. We need not fear that a government will destroy a selected group of taxpayers by burdensome taxation if it must impose the same burden on the rest of its constituency.*

Id. at 585 (emphasis added).

This Court summarized these political constraints as follows:

> We noted that the general applicability of any burdensome tax law helps to ensure that it will be met with widespread opposition. When such a law applies only to a single

> constituency, however, it is insulated from this political constraint.

Leathers v. Medlock, 499 U.S. 439, 445 (1991).

The potential enactment of the type of taxes at issue here, specifically directed, or legislatively gerrymandered, to apply only, or primarily, to controversial, unpopular, or disfavored speech/expression, is simply not circumscribed by the type of political counterweights noted by this Court in *Minneapolis Star* and *Leathers*. Because of the political ease of enacting these types of significant (and most likely unconstitutional) taxes upon the engagement of controversial, unpopular, or disfavored expression, the present political and economic climate (where virtually every state and municipality is underfunded and seeking ways to increase revenues – *i.e.*, raise taxes – in a fashion that will not peak the political ire of the general electorate), and the inability to seek and obtain prompt judicial redress through the federal courts to challenge such laws, this Court should grant the Petition in order to provide prompt direction on the jurisprudential standards to impose when evaluating the constitutionality of such taxes.

III. REVIEW IS NECESSARY TO LIMIT THE EXPANSION OF UTILIZING INTERMEDIATE SCRUTINY UNDER THE "SECONDARY EFFECTS" DOCTRINE IN ORDER TO JUSTIFY CONTENT-SPECIFIC TAXES THAT OTHERWISE VIOLATE THE FIRST AMENDMENT.

There are three ways that a tax may violate the First Amendment. First, a direct tax specifically on First Amendment freedoms is unconstitutional. *Murdock*, 319 U.S. at 108 ("[I]t could hardly be denied that a tax laid *specifically on the exercise* of those freedoms would be unconstitutional") (emphasis added). Second, a tax that targets a narrowly defined group of speakers is unconstitutional. *Leathers*, 499 U.S. at 447-448 ("A tax is also suspect if it targets a small group of speakers" as it "runs the risk of affecting only a limited range of views"). *Leathers*, 499 U.S. at 447-448. Third, a content-based tax is unconstitutional. *Leathers*, 499 U.S. at 447 ("Finally, for reasons that are obvious, a tax will trigger heightened scrutiny under the First Amendment if it discriminates on the basis of the content of taxpayer speech").

Possibly for the first time in the annals of American jurisprudence, the Utah Supreme Court has sustained a targeted tax upon First Amendment expression that violates *all three* of the fundamental precepts set forth by this Court above, on the ground that the tax statute satisfied the intermediate scrutiny test of *United States v. O'Brien*, 391 U.S. 367

(1968), based upon the justification of the "adverse secondary effects" of adult entertainment. While *Amicus* will not reiterate the cogent arguments of the Petitioners in this regard, it does desire to expand upon some of those comments, particularly in regard to Justice Kennedy's controlling opinion in the fractured decision of *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002) (plurality),[7] and to respectfully illustrate to this Court the proverbial slippery slope down which the Utah Supreme Court has stepped.

First, Utah's attempt to justify its tax based upon the "adverse secondary effects" of adult entertainment has no support in the jurisprudence of this Court. Specifically, Justice Kennedy stated in his critical *Alameda Books* concurring opinion that: "A city may not regulate the secondary effects of speech by suppressing the speech itself. *A city may not, for example impose a content-based fee or tax. . . . This is true even if the government purports to justify the fee*

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[7] Under *Marks v. United States*, 430 U.S. 188 (1977), the Circuits have generally held that Justice Kennedy's concurring opinion represents the constitutional "holding" of the Court's plurality decision in *Alameda Books*, regardless of the type of legislation at issue. *See, e.g., 729, Inc. v. Kenton County Fiscal Court*, 515 F.3d 485, at 491 (6th Cir. 2008); *Annex Books, Inc. v. City of Indianapolis*, 581 F.3d 460, 465 (7th Cir. 2009); *SOB, Inc. v. County of Benton*, 317 F.3d 856, 861-862 (8th Cir. 2003), *cert. denied*, 540 U.S. 820 (2003); and *Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee County*, 337 F.3d 1251, 1269 (11th Cir. 2003), *cert. denied*, 541 U.S. 988 (2004).

by reference to secondary effects." *Id.* at 445 (emphasis added, citations omitted).[8]

Second, the reason that this secondary effects doctrine has no support from this Court in justifying the enactment of a targeted tax is because such application basically eviscerates the *O'Brien* test. Those standards require courts to examine, among other things, whether "the regulation *furthers* an important or substantial governmental interest," and whether the "*incidental restriction* on alleged First Amendment freedoms is no greater than is *essential* to the furtherance of that interest." 391 U.S. at 377 (emphasis added). Specifically, the challenged regulation must advance the governmental interest "in a direct and effective way. . . ." *Ward v. Rock Against Racism*, 491 U.S. 781, 800 (1989).

The government's burden to establish this fact is not satisfied by "mere speculation or conjecture," and the government must "demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a *material degree*." *Edenfield v.*

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[8] *Accord, id* at 450 ("This reasoning would as easily justify a content-based tax: Increased prices will reduce demand, and fewer customers will mean fewer secondary effects. *But a content-based tax may not be justified in this manner*") (Kennedy, J., concurring) (emphasis added); and *id* at 451 ("It is true that cutting adult speech in half would probably reduce secondary effects proportionally. But again, a promised proportional reduction does not suffice. *Content-based taxes could achieve that*, yet these are *impermissible*") (Kennedy, J., concurring) (emphasis added).

Fane, 507 U.S. 761, 762, 770 (1993) (emphasis added). Succinctly put, a court must be presented with a legislative record which sufficiently contains evidence "as to *how effective or ineffective*" the regulation is or might prove to be in order to ensure that the legislation does not sacrifice important First Amendment interests "for too 'speculative a gain.'" *Denver Area Educational Telecommunications Consortium, Inc. v. F.C.C.*, 518 U.S. 727, 760 (1996) (emphasis added) (quoting *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 127 (1973)).

But a tax does not "*further*" the interest of ameliorating adverse secondary effects, nor is it "essential" to that goal. Quite simply, it does not satisfy *any* of these constitutional precepts. Rather, these types of targeted taxes are an after-the-fact *penalty* for the engagement in protected expression that some find to be distasteful.

Moreover, the array of regulations that the jurisprudence of this Court has permitted in order to address adverse secondary effects (zoning restrictions, nudity prohibitions, hours-of-operation restrictions, and the like) are all justified on the basis, through application of *O'Brien*, that they will have the effect of eliminating any adverse secondary effects that may have existed in the past. And, these types of restrictions are now widely enacted throughout Utah and, indeed, the rest of the United States. Yet, even though other type of regulations are in place to address adverse secondary effects, the Utah Supreme

Court permitted, without even analyzing this circumstance, a tax upon protected expression based on the presumption that these concerns still existed (if, in fact, they were ever present in the past).

Again, reference to Justice Kennedy's concurring opinion in *Alameda Books* points out the constitutionally flawed nature of the Utah Supreme Court's analysis in this regard. Justice Kennedy noted that regulations may constitutionally be utilized to reduce secondary effects, but they cannot have the consequent effect of also reducing expression-related activities.[9] This has become known as the "proportionality test" of *Alameda Books*. The Utah tax would seem to be the quintessential violation of this concept, as the tax itself cannot, in any regard, rectify or even reduce any "adverse secondary effects." Yet, imposing a financial disincentive to the engagement of protected expression (through a tax)

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[9] *Alameda*, 535 U.S. at 445 ("a city may not regulate the secondary effects of speech by suppressing the speech itself") (Kennedy, J., concurring). Specifically, Justice Kennedy observed that a regulation can be consistent with the First Amendment "if it is *likely* to cause a *significant decrease* in secondary effects and a *trivial decrease* in the quantity of speech," *id.* at 445 (Kennedy, J., concurring) (emphasis added), and summed up his analysis as follows: "A city may not assert that it will reduce secondary effects by reducing speech in the same proportion. On this point, I agree with [the four Justice dissent authored by] Justice SOUTER *See, post*, at 1746. The rationale of the ordinance must be that it will suppress secondary effects – and not by suppressing speech." *Id.* at 449-450 (Kennedy, J., concurring) (clarification added).

can certainly result in the reduction of expression-related activities. *See Joelner*, 378 F.3d at 627-628.

Two recent developments in the lower courts further make the point that tax laws simply do not fit within the types of regulations that can logically be subject to the secondary effects doctrine. In engrafting Justice Kennedy's proportionality test onto a state constitutional analysis, the Arizona Supreme Court in *Arizona v. Stummer*, 194 P.3d 1043 (Az. 2008), noted that "the State must show [observing that the burden is upon the government in this regard] that, in addressing the secondary effects, the regulation does not sweep too broadly." 194 P.3d at 1050 (clarification added). In words taken almost verbatim from Justice Kennedy's *Alameda Books* opinion, that court stated that it "must examine whether the regulation protects substantial government interests *and whether it significantly reduces secondary effects without unduly interfering with protected speech*. . . . For the regulation to survive, its proponent must show . . . that the regulation significantly furthers [the substantial governmental] interest, and that the challenged regulation does not unduly burden speech." *Id.* at 1050-1051 (clarification added). *No tax law does this.*

Additionally, the Seventh Circuit recently issued a pair of decisions authored by the esteemed Judge Frank Easterbrook regarding – in light of Justice Kennedy's concurring opinion in *Alameda Books* – the government's burden to establish the secondary effects justification for the enactment of a law that

impacts upon protected expression. *Annex Books, Inc. v. City of Indianapolis*, 581 F.3d 460 (7th Cir. 2009); and *New Albany DVD, LLC v. City of New Albany*, 581 F.3d 556 (7th Cir. 2009). In *Annex Books*, Judge Easterbrook, for a unanimous court, noted that "the public benefits of the restrictions must be established by evidence, and not just asserted. . . . [T]here must be *evidence*; lawyer's talk is insufficient." 581 F.3d at 463 (emphasis in original). And, two weeks ago, this Court declined to review the Petition for Writ of Certiorari in *New Albany DVD*, *cert. denied*, ___ U.S. ___, 2010 WL 752359 (U.S. June 14, 2010). No content-based targeted tax could be upheld in the Seventh Circuit under this type of analysis, even assuming the propriety of applying the secondary effects doctrine to such a constitutional challenge.

Should the decision of the Utah Supreme Court not be reviewed, it will establish a dangerous precedent that will be used across the country to radically expand the secondary effects doctrine far beyond the current constitutional constraints and parameters set by this Court, permitting the unbridled enactment of virtually any tax on protected expression. In order to ensure the continued application of the Court's current First Amendment taxation jurisprudence, the Petition should be granted.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

BRADLEY J. SHAFER
(Counsel of Record)
ANDREA E. PRITZLAFF
SHAFER & ASSOCIATES, P.C.
3800 Capital City Boulevard,
Suite 2
Lansing, Michigan 48906
Telephone: (517) 886-6560
Facsimile: (517) 886-6565
shaferassociates@acd.net

Counsel for Amicus Curiae
Association of Club
Executives, Inc.

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